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VERA DAVIDSON, Administratrix of the Estate of Scott Davidson, Jr., deceased,

(Plaintiff) Appellant,

V. SUPERIOR COURT

A. A. SPRAGE and BRIETON I. SUDD, as Receivers for Chicago Rapid Transit

Company, a corporation,

(Defendants) Appellees. 305 I.A. 157

MR. JUSTICE HEBEL DELIVERED THE OFINION OF THE COURT.

This is an action at law based upon the attractive nuisance theory by the plaintiff, administratrix, against the defendants to recover damages for the wrongful death of Scott Davidson, Jr., a child less than ten years of age. At the conclusion of the plaintiff's case the court directed the jury to return a verdict in favor of the defendants, and it is from this judgment entered pursuant to said verdict that the plaintiff appeals.

The pleadings allege that the defendants were operating elevated trains mear the intersection of Virginia Street and Leland Avenue in the City of Chicago, at substantially ground level and that at the said place there was a public playground immediately adjacent to the right-of-way and that the defendants' trains were propelled by electricity, receiving the electricity from an exposed third rail; that on June 15, 1935 a barrel containing spikes was situated on the right-of-way between the second and third rails of two asparate tracks and that the plaintiff's intestate, a boy of nine years and seven months, went upon the premises, attracted by the spikes and the railroad, etc., and came to his death by coming in contact with said third rail; that the defendants were negligent in view of the attractive muisance aforesaid by maintaining an inproper fence around said premises, said fence being a so-called hog wire fence, that is to say, having meshes in which the strands run vertically and horizontally with strands more than three inches

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VERA DAYLOGOR, Administratrix of the Ratate of Boots Devideon, Jr., decreased

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Company, a corporation,

(Plaintiff) Appellant,

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(Defendants) Appellees. 305 I.A. 157

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The pleadings allege that the defendants sere obserting slowed trains near the intersection of Virginia street and leight Avenue in the City of Calonse, at substantially ground level and that at the seid place there see a public playsround isseriately edgeent to the right-of-sey and that the defendants' trains sere propelled by electricity, receiving the electricity from an exposed third rail; that on June 15, 1855 a barrel containing spines set it is a cipht-of-say between the second and third rails of electrated on the right-of-say between the second and third rails of two sees the right-of-say between the second and third rails of the spines and seven months, sent upon the pregises, attracted by aims the railress, ato, and came to his death by obaling the contact with said third rail; that the defendants were recilient in view of the ritractive muleshee aforesaid by maintaining and in view of the ritractive muleshee aforesaid by maintaining and in proper fence around said premises, said fence being a so-called in proper fence around said premises, said fence being a so-called

apart, forming, a virtual ladder for children to climb over.

The defendants filed an answer denying the material allegations except the ownership of the premises, the operation of the trains, the death of the plaintiff's intestate and the heirship of the latter.

The facts that appear from the evidence are the defendants operated what is commonly referred to as the Elevated Railroads in Chicago. The undisputed evidence tends to show that the plaintiff's intestate climbed the fence and went upon the tracks solely to get spikes from a keg. Immediately adjacent to defendants' right-of-way there is now and has been for more than twelve years last past a public playground where children are accustomed to play, which playground has a fence on only three sides, but from which children have access to the adjoining right -of -way. The particular vicinity is in a thickly settled residential district of Chicago. The plaintiff's witness Owen, a boy who was with plaintiff's intestate, testified that "Three of us boys went up on this bank of dirt, and Scott, the boy that was killed, went over to the keg. He reached down into the keg and took some railroad spikes, then he brought the spikes over to his brother Charles. * * * Then he went back to get some more spikes out of the keg. A train was coming and he started to run. He tried to get away. He tripped over the third rail. The younger brother of plaintiff's intestate testified: "My brother went over the fence and up the bank to get the spikes. He came back and gave me some spikes and then went up the bank again to get some more spikes. I guess he got excited and started to run and tripped."

The accident happened upon the defendants' railroad tracks between Virginia Avenue and the north branch of the Chicago River.

At the point of the accident the railroad tracks run east and west upon an embankment. North of the tracks Virginia Avenue runs in a

apart, forming, a virtual ladder for children to climb over.

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ripe defendants filed an answer denying the material ellegations except the constants of the presises, the operation of the
trains, the death of the plaintiff's intestate and the helronic of
the letter.

simple table out or second in any south the said atost edit operated what is commonly referred to as the Reveted Rallender o'lliming of the word of sheet eventive between the the first our old received the fence and went upon the trace ballety to get spires from a meg. Imachistoly adjacent to defendants right-of-may a they feal erecy syless and stan tol used and has you at again public playeround shere children are consequed to play, which playeven nerbline duise mort jud asble serdy vino so sone a and bowers of visitely relacions off .ver-to-shir galalogae and of seems -misia and .onsoled to solvield inlinearies balties winded a mi wift's witness Cook, a boy also with plaintiffs intesseets, tootithat that "Tires of us boys went up on this bank of dirt, and leave, cont and bedoes an . . . and sait of rave date, hallis are food yed and the ker and took some rations spikes, then he brought the spikes ower to his brother Cherles. * * * Then he sent beek to get some more spikes out of the keg. A train was coming and he started to run, No tried to got away. He tripped over the third reil." The younger reve state of claiming a late of the section of the even has doed ease all assligs and to ge had ond and one found with me some spikes and then went up the bank again to get come more notice ".becgist bne mer at befrate bus betieve fog ad seeng I

between Virginia Avenue and the north branch of the Chicago Siver.
At the point of the moddent the railroad tracks run week and west

northwesterly direction. There are no attrets running north and south between the river and ir inia venue. Virginia venue enis at the religond right-of-way. Immediately north of the right-of-way and lest of Virginia Avenue is a triangular piece of ground. At Virginia I venue this triangular piece is 40 feet wide and tamere toward the west to about five feet wide at the river. This triangular piece is bound on the east by Firginia Avenue, on the north by a playeround park, and on the south by a right-of-way fence and on the west by the river. The size of this park is 150 feet morth and south by 135 feet deep. Jurrounding this play round is a bog wire fence 48 inches high, that is, the strands run vertically and horisontally, in which the square meshes are about 4 by 6 inches agart, it is suggested by the plaintiff that it serves virtually as a ladder. In some places slong the right-of-way there is a borbed wire, but there is no wire directly opposite the playground. The right-of-way is perfectly visible from the claysround immediately to the north. This right-of-way consists of two tracks, one an eastbound and one a estbound track, with a special live third wail paralleling each track. On Saturday, June 15, 1935, about 3 P.W. about four years ago, the plaintiff's intestate, a boy nine years and seven months old - born October 23, 1925 - together with three or four other little boys were apposite the right-of-way. They had played there before. On this occasion from off the defendants' right-of-way they saw a barrel of spikes between the tracks. These boys were, deorge Edwin Owen, Jr., nine years old, Charles Davidson, " brother of the deceased, eight and one-half years old; both of whom were witnesses, and Jack Dasparo. They climbed over the fence at a point about 30 feet east of the bridge. The borrel of spikes was about 25 feet east of the bridge. Charles Joott, however, est through a hole near the bridge. Surrounding this playground on the south, west and north was a small mesh wire fence, 6 feet high.

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At the time of the accident the plaintiff's intestate lived with his parents at the northeast corner of diddings Street and Virginia Avenue. They formerly had lived on Leland at Wookwell. Frior to that they had lived in an apartment back of the father's office at wockwell and Leland. (leintiff's intestate had been going to school for 3-1/2 years. He was a bright boy and had a good standing in school. The tracks cross sockwell street on the ground and there was a third rail near the sideralk and a sign reading, "Canger - Llectric Current - Keep Out". Plaintiff's intestate had to cross the tracks at lockwell from the street there his parents lived, in going to and from school for 3-1/2 years. There was a sign reading, "Danger - Keep Out" at the tracks at the foot of Virginia Avenue. Noth parents cautioned plaintiff's intestate not to go on the right-of-way. Wis brother testified: "I guesa he got excited and started to run and tripped. In going over to the keg he stepped over the third rail and in coming back from the first trip he also stepped over the third rail". The Owen boy and the brother of plaintiff's intestate gave substantially the same testimony as to how the accident happened.

The defendants' contention is that it was a necessary element of plaintiff's case to show that plaintiff's intestate was rightfully at the place where the accident happened and was not a tresposser upon the premises of the defendants. Otherwise the defendants owed him no duty, except to refrain from milifully injuring him. This rule is theroughly established as the law of this state applicable to attractive nuisance cases as well as others. The defendants point to the case of solcrek v. Fublic Service Co., 342 Ill. 482, where the court said:

[&]quot;It is likewise the rule that the owner of private grounds is under no obligation to keep them in any particular atote or

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condition to promote the a fety of trespendire, intruders, idlers, bare licensees, or others who come upon them without invitation, either expressed or implied. This rule applies equally to adults and children."

The court further states in this case:

"The rule recognized in this etate as to implied invitation is, that where the owner of the premises maintains a dangerous condition or thing of such a character that he may reasonably enticipate that children, who by reason of tender years are incapable of exercising proper care for their own safety, are likely, because of their childish instincts, to be attracted to the dangerous thing and thereby exposed to dangers, he is required to use re-sonable care to protect them from injury, provided it is shown that such dangerous condition or thing is so located as to attract children from the street, playground or place where they have a right to be. such an agency is so iscated it constitutes an implied invitation to such children to come upon the premises and they are not, in law, considered trespossers. The rule does not apply where the owner maintains something for his own use which, though dangerous, would be found by such children only by loing uron the premises as trespessers. In other moris, to incliedly invite children onto the premises it is necessary that the dangerous agency, with its alluring and attractive character, be so placed as to attract the children there. Marke, 356 Ill. 401; St. Louis, Vandalia and Terre Haute Mailroad Co. v. eli, SI Ill. 76.) If there is such an implied invitation to go upon the premises the enild is not considered, in law, a trespasser but an implied invitee."

The defendants in their brief state that the undisputed evidence shows the plaintiff's intestate climbed the fence and went upon the tracks solely to get spikes from the keg, and upon this question george Owen, Jr., a boy 9-1/2 years old testified:

north side of the track. It was near the playground. We had played on the playground, the one just north of the elevated tracks before this Saturday, and that Saturday afternoon we saw a barrel of spikes on the railroad. You could see the barrel before you crawled over the fence. It was between the two third rails. On this afternoon Scottie went to get some spikes and then, I think he brought them back to get some more apikes. I think a train was coming and he got scared and he tripped on the third rail."

It would seem from defendants' own brief, from which we have just quoted, that the plaintiff's intestate climbed the fence and went upon the tracks solely to get spikes from the keg.

The trial judge ande this statement in directing the verdict:

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"I do that as a metter of law under the evidence, and on the ground that, in my opinion, under many decisions of this state and of other states, there has been no attractive nuisance proved by the plaintiff that would tend to allure a child of tender years to go upon the track."

and this, of course, is the issue here. The evidence clearly establishes that the fence was about 4 feet high of moven wire, consisting of vertical wires about 6 inches apart and horizontal wires about 4 inches apart, and that there was no other obstruction than the 4 foot fence. This was corroborated by witnesses.

In order to properly consider this question it might be well to be guided by the expressions of the courts of appeal as to what is an attractive nuisance and what is the duty of the owner or person in central of lands and buildings to protect children from injury.

In the case of Oglesby v. Natropolitan heat Side 11. ay.Co.
219 Ill. pp. 231, where children went into an elevator building
upon the premises of the defendant, which was not properly protected,
we said:

cannot as a matter of law come under the doctrine of the attractive muisance cases. Attractive muisances have been defined to be such things causing injury, left exposed and unquarded, which are of such a character as to be an attraction to children, appealing to their childish curiosity and instincts. The owner of land, where children are allowed or accumstomed to play, particularly if it is unfenced, must use ordinary care to keep it in safe condition; for they being without judgment and likely to be drawn by childish curiosity into places of langer are not to be classed with tresposaers, idlers and mere licensees. Gity of Fekin v. Ichahon, 184 Ill. 141."

from the evidence of the plaintiff, we find that the right-of-way of the elevated railroad, the defendants in this case, was fenced. In other words, it had a fence four feet in height along its right-of-way to prevent persons from traveling upon it.

In the case of <u>seymour</u> v. Union stock Yards Go., 214 111.

573, the appellant was attracted by a pile of clay slong the resilross

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track. He sent upon the pile to play and abile so engaged was in no danger. As the train passed, the boy no longer attracted by the bank of carth, began touching, playing with and running alongside the slowly adving dars, and finally fell under them, sustaining the injury complained of. The court there said:

"Mere an element intervened between the acts induced by the allurements of the clay pile and the injury, vis., the movements of the boy in placing himself in contact with and in resping alongside the cars."

In further discussing the cuestion involved, the court seid:

"The proximate cause of the injury in this case we not the pile of blay, nor any danger with which the boy was brought in contact while gratifying any curiosity or desire excited by that pile. The injury was proximately caused by the sovenents of appellant in placing his hands upon and in running alongside the ears."

In the case of Reasay v. Juthill Haterial Co., 795 Ill.
395, the court held that if one engaged in any operation dangerous
to those coming in contact with it permits omitaren who are
incapable of appreciating the danger to come upon the premises and
expose themselves to danger, he must take such means to prevent
injury to them as will be effective or exclude them from the premises.

to children it is the duty of the owner of the premises to take such steps to protect the children if they are permitted upon the premises, or to berricade or fence the premises so that the children will not be able to come upon the premises, and if they do so by climbing such berricade or fence they become trespessers and an action will not lie for any injury that may be suffered by the child under such circumstances, unless there was a wilful or wanton act by the owner which would justify a judgment for injuries sustained by the child.

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argued - to get some railroad spikes out of a keg which it is claimed argued - to get some railroad spikes out of a keg which it is claimed are attractive to children and which was near the place in question. The child did get the spikes and gave them to his brother, who also had crawled through an opening upon defendants' track, and returned for the surpose of getting more spikes, when, as the facts indicate, he heard an elevated train coming and in order to avoid this train he started to run and tripped over the third sail, which certies the electricity to operate the road, and was killed by the electric shock, so that the fact that he was attracted by his curiosity to obtain spikes and did get them, was not really the proximate cause of the injury, but his running and tripping over the third sail, and upon this question it might be sell to consider what our courts have said.

In the case of sixons v. Dole valve Go., 288 Ill. App.

288, the case involved the question of a double gate which opened and permitted entrance into the defendant's presises. The plaintiff contends that the gates in the fence around the defendant's premises, by reason of their massive and peculiar construction and the fact that they were always open, unlocked and unguarded, although there was a lock on the gates which was nover used, and by reason of the further fact that the children in the neighborhood were allowed to play on the gates and on defendant's premises unhindered and were never forbidden to play on the gates and on defendant's premises, it was incumbent on the defendant to prevent the maintenance of a dangerous instrumentality upon its premises by means of which children of tender age might be injured, and upon the question of liability this court said:

"It is essential in order to prove the liability of one who maintains a so-colled attractive nuisance, that the thing which attracted the child upon the premises, or so wething

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inseparably connected therewith, be the proximate cause of the injury. As the supreme Jourt and in the case of severant v. Surke, 256 III. 471, 478; 'It is a necessary element of the liability that the thing which causes the injury is tempting to children and to constitute a seems of attracting them upon the premises which the owner should anticipate.

The evidence in this case shows that the boy was not attracted by the so-called gate; that he was not standing on it nor playing with it as is charged in the complaint.

proof in this case as to sho opened the gate or that the defendant knew that the gate are open, or sho moved the gate at the time the boy's fingers were injured.

It necessarily follows that the plaintiff's evidence does not establish a cause of action and the trial court did not err in directing the jury at the close of plaintiff's case to find the defendants not guilty and is entering judgment upon such finding. The judgment is affirmed.

JUDGMENT AFFISHED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

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VERA DAVIDSON, Administratrix of the cattle of Boott Cavidson, Jr., decemps,

Plaintiff-poolignt.

APPEAL FROM AUPERIOR COURT

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Defand his-Appellese.

305 I.A. 157

OR RENEARING

MR. JUNIOR BUREL DELIVERED THE OPILION OF THE COURT.

This court filed an opinion in a suit which was pending here on appeal by the plaintiff, identification of the latate of leott avidson, Jr., decembed, from a judgment for the defendants in an action by the plaintiff to recover damages by reason of the negligence of the defendants in causing the death of the decembed.

The plaintif: filed a petition for a rehearing upon the ground set forth in the petition. The petition was allowed and thereafter the defendants filed an anser thereto.

and collect to our attention, we have reached the conclusion that
the court will modify its opinion by striking out on the second page
of the opinion after the words three eides, "but from which children
hav access to the adjoining right-of-way," so that the language will
appear as follows:

"The facts that appear from the evidence are the defendants operated what is commonly referr 4 to as the lev ted mailroads in "hicego. The undisputed swidence tends to show that the plaintiff's intertate climbed the fence and went upon the tracks solely to get spikes from a keg. Immediately adjacent to defendants' right-of-may there is new and has been for more than twelve years last past a public playground where children are accustomed to play, which playground has a fence on only three sides."

and further, that we will adhere to the opinion herein as modified.

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The judgment entered for the defend ats is affirmed.

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DENIS E. SULLIVAN, P. J. BURKE, J. CONGUR. complete of the second our set became described and

A CAMPINE ASSESSMENT

STATE OF ILLINOIS

Abstract

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM

A.D. 1939.

TERM NO. 7

AGENDA 16

GEROLD MOVING & WAREHOUSE CO., a Corporation,

Appellee,

Appeal from

The City Court

VS

of

POTOMAC INSURANCE COMPANY of the District of Columbia.

Appellant.

The City of East

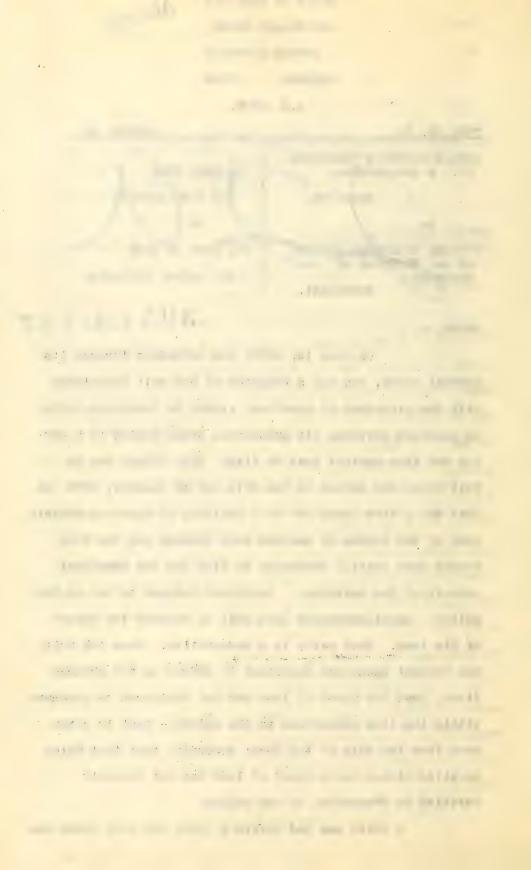
St. Louis, Illinois.

STONE, P. J.

305 I.A. 157

On June 19, 1937, the defendant through its general agent, who was a neighbor of and well acquainted with the president of appellee, issued an insurance policy to appellee covering six automobile truck bodies of a moving van type against loss by fire. Said policy was in full force and effect on the 27th day of January, 1938. On that day a fire broke out in a building of appellee wherein four of the trucks so covered were garaged and the four trucks were totally destroyed by fire and the resultant cave-in of the building. Appellant refused to pay on the policy. Appelleebrought this suit to recover the amount of his loss. Each party is a corporation. When the suit was brought appellant undertook to defend on two grounds: first, that the proof of loss was not delivered to appellant within the time prescribed in the policy .- that is sixty days from the date of the loss; secondly, that that which appellee claims was a proof of loss was not properly verified as prescribed by the policy.

A trial was had before a jury; the jury found the



issues for the plaintiff and assessed its damages at the sum of Five Thousand Dollars. Motions for directed verdict and for new trial were overruled by the court, and appellant brings this appeal, urging the two defenses urged in the trial court.

On the 28th day of March following the fire, appellee delivered to the authorized agent of appellant its proof of loss. Eliminating the first day, that is January 27th, the day the fire began -- the fire burned for two days, - the proof of loss delivered on March 28th, 1937, was within sixty days from the time of the loss according to any well known and established system of calculation and. according to our Statute on that subject. (Revised Statutes 1937, Chap. 131, Par. 1; Chap. 100, Par.6). Appellant undertakes to divide this time up into hours and show that the necessary hours to make sixty days had more than intervened. This unique method of calculating time is not only in defiance of our Statute, but is such a method which under the circumstances which obtain here we would not consider at all unless we were positively constrained to do so by substantial authority. This we do not find. In our judgment there is no question but what this proof of loss was delivered on time. Furthermore, it was delivered to the agent who wrote the policy and who was a close neighbor of the president of appellee. The agent received this, made no complaint or objection or suggestion, and delivered it to appellant. This agent was general agent of appellant; he wrote the policy; he came to the fire on the morning of the fire; he knew all about the situation and all about plaintiff-appellee and its activities.

The second contention is that the proof of loss was

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posts of entering him here and an experience of and the few terms of the analysis of the contract of the contract of response of the transfer to test to the first and the first and the first god gold to here the bail and a shift sail for the paid that have a strong restriction of the contract profession and the rest of the contract of the in the control provide according a right of the control of the d. de f nombre procesor en main en la contraction de la marchana en marchana. this tien is a reflect to the market of state of the weather complete of the life of in projection Constant in November 1, the Constanting for the best for makes the first of the sale of the end against a tack the resident of a flatforch larger flat one. I can to play me to the two objects to stimucian father the , we fill eight people with the edge for the Unit of Mining of the Unit of the residence is the problem of the commence of the commenc

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not properly verified as the contract of insurance prescribed that it should be, and was, therefore, insufficient to amount to a proof of loss, and for that reason the court should have instructed the jury to find the issues for the defendant.

The proof of loss was signed "Gerold Moving and Warehousing Co. by E. F. Gerold", and the affidavit thereto was executed by Mr. Gerold. In German Fire Insurance Company vs Grunert, 112 Ill. 68, the Supreme Court had before it an affidavit to an insurance proof of loss very similar to the one at bar, and in passing on the signing of the proof of loss, where the same objection is made. said that the objection to such proof is hypercritical. We are inclined to the same belief as to this objection. Appelle had been in business for many years in East St. Louis. Mr. Gerold the president thereof, and Mr. Hanson the general agent of appellant had been acquainted for approximately thirty-five years, and as said before, they were neighbors. Hanson had written the policy in question. His place of business was one block from the place of business of appellee. Together these two men discussed the question of the fire and loss, and in general the record shows that no person other than Mr. Gerold was recognized by Mr. Hanson or by Mr. English, another agent of the defendant company, as having any official identity with appellee. Under no circumstances could appellant have been injured by the failure of Mr. Gerold to write the word "President" after his signature to the affidavit. In Globe Mutual Life Insurance Association vs March, 118 Ill. App. 261, appellee swore to the proofs of death personally instead of as executor and upon objection thereto the court said at page

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180, "The addition of the word 'executor' to his signature was a useless act" with the prefacing remark "The objections to the proof is extremely technical". In Templeton vs Hayward, 65 Ill. 178 at page 180 our Supreme Court said "It may be usual in executing instruments by corporations for the officer or agent to sign his name under that of the company as evidence that it is executed by the person having authority. Still such a signature is by no means essential."

In this case the proof was signed by the appellee company; it was prepared by Mr.Gerold, its president, and by him handed to the general agent of appellant. That agent knew Mr. Gerold was president of plaintiff company, and the addition of the descriptive words would not have given him any information that he was not already in possession of.

It is next urged that the verdict is excessive.

The jury heard the evidence and made its finding. The trial judge was in a much better position to determine that question than this court.

There was no substantial defense to this lawsuit.

The judgment of the City Court is affirmed.

JUDGMENT AFFIRMED.



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STATE OF ILLIEDIS APPELLATE COURT POURTH DISTRICT OCTOBER THRM

A.D. 1939

Abstract

TERE NO. 10

AGRIPM NO. 9

WILLIAM MCGUIRE, CHARLES MCGUIRE, CARL MCGUIRE, KENNETH-MCGUIRE. and EVERETT McGUIBE, Miners, by FRED McGUIRE, their next friend, and HOMER McGUIRE.

Plaintiffs in error

HERCHARTS STATE BANK OF CENTRALIA, ILLINOIS TRUSTER, and E. T. JOHNSON, Defendants in error Error to the

Circuit Court of

Marion County.

305 I.A. 158

STORE, P. J.

This case comes to this court by way of a writ of error sued out to review a decree of foreclosure entered by the Circuit Court of Marion County on November 12, 1932. The bill for foreclosure was brought by the Merchants State Bank of Centralia, Illinois, as trustee in a trust deed in the nature of a sortgage, and E. T. Johnson, as the holder of a note against Homer McGuire, one of the makers of the note, (the other joint maker, Anna McGuire, wife of Momer McGuire, being deceased,) and William McGnire, Charles McGuire, Carl McGuire, Kenneth McGuire, and Everett McGuire, minors, the children of Momer McGuire and the deceased, Anna McGuire. The bill for foreclosure alleged in substance that Homer McGuire and Anna McGuire had executed a note and mortgage; that the note was past due and that \$1282.60 remained due thereon; that Homer McGuire and Anna McGuire were tenants in common; that the latter died intestate, and that she left surviving, her husband and five named children as her heirs, and prayed for a foreclosure.

Upon filing of the bill, a summons was issued, directed to the Sheriff of Marion County, for all of the defendants in the cause, returnable on the fourth Monday in September. 1932. The return of the Sheriff on this summons shows that it was served on Homer McGuire on September 2. 1932. The return further shows that it was served upon William McGuire, Charles McGuire, Carl McGuire, Kenneth McGuire and Myerett McGuire, minor defendants, by leaving a copy thereof for them at their usual place of abode, with Homer McGuire, a person of the age of ten years and upwards and a



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appointed by the court for all minor defendants and he filed a formal answer, neither admitting nor denying any of the allegations of the bill, but submitting the rights and interests of the minors to the protection of the Court. Default was entered as to all adult defendants and the cause referred to the Easter to take and report testimony. The Easter duly filed his report, cause was heard, and a decree for foreclosure and sale was entered and thereafter the premises were sold, and one of the complainants, E. T. Johnson was the purchaser at said sale.

Thereafter this writ of error, was sued out by William McGuire, Charles McGuire, Carl McGuire, Renneth McGuire and Everett McGuire, who are still minors and who prosecute this writ by Fred McGuire, their uncle and next friend. Their father, Homer McGuire, enters his appearance and becomes a party plaintiff to the writ of error.

In this court, motion was made by S. T. Johnson, defendant in error, for leave to:

- File attached suggestions of the transfer of interests
 of the defendant in error;
- 2. For dismissel of the writ of error; or in the alternative
- For substitution of new parties as defendants in error;
 and

For the transfer of said cause to the Supreme Court; and in aid and support of said notion presented certain attached suggestions supported by affidavit.

Charlie E. Richardson and The Texas Company, a corporation, parties named in the suggestions therein, asked leave to intervene in this cause and to adopt the suggestions and motion of the defendant in error, E. T. Johnson.

And in this court also, motion was made by James Hailey and Fred Sample for leave to file suggestions of transfer of interests by defendant in error.

No provision was made under the Practice Act of 1907 for substitution of parties or for suggestions, supported by affidavit, as are now provided for, by the Civil Practice Act, and by the rules of the Supreme Court and Appellate Court. The repeal section of the Civil Practice Act, provides that it shall not impair or affect any action or proceeding commenced before the act takes effect. In view of the foregoing and the fact that this writ

of error is for the surpose of reviewing the decree of November 12, 1932, we are of the opinion that the sections of the Civil Practice Act relied upon by the defendants in error do not apply, and all these motions as above, are denied.

The principal contestions of the plaintiff in error upon the errors assigned were:

First: That the interest of Homer McGuire in the suit, one of the joint makers of the note was in conflict with and opposed to, the interest of the minor defendants and that service on the minors by leaving a copy of the summons with said Homer McGuire, was not good service on the minors.

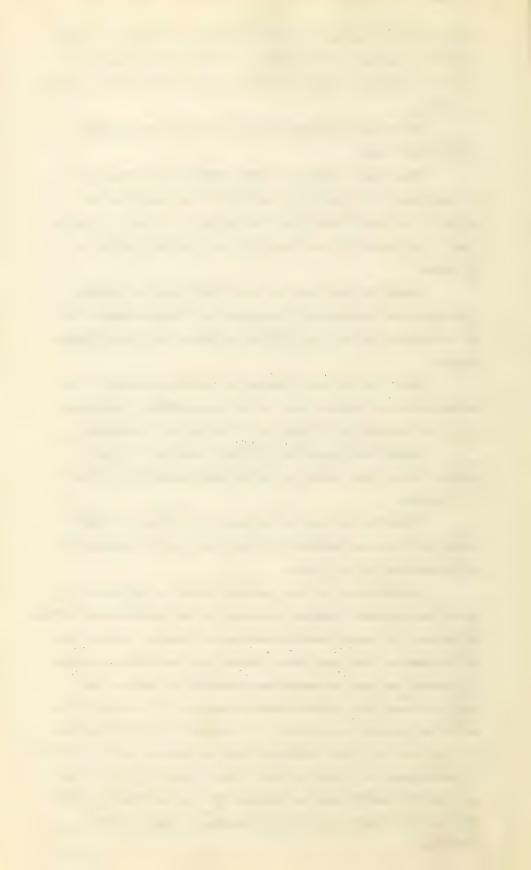
Second: That the decree was entered solely upon the testimony of the complainant who was wholly incompetent as a witness because all of the defendants in the case were defending as heirs at law of Anna McGuire, deceased.

Third: That the note evidencing the indebtedness secured by the mortgage which was foreclosed shows on its face, as offered in evidence, that it had been paid in full prior to the time the suit was brought.

Fourth: That the guardian ad litem did nothing in the case except to file a formal answer, and took no steps to protect the interests of the minors;

Fifth: That the Court had no jurisdiction to enter the decree because it did not have jurisdiction of the minors who were necessary and indispensable parties to the suit.

We believe that the first question, that of the sufficiency of service upon the minors involved, is the only serious question herein involved. The return of the sheriff showed service upon all minors by leaving a copy of the summons at their usual place of abode, with Homer McGuire, a person of the age of ten years and upwards and a member of the family of said minor defendants, which return follows the language of the statute in force at the time this service was made. It is contended by plaintiffs in error that the interests of Homer McGuire, the adult defendant and of his children as co-defendants were adverse and rely principally upon the cases of Sharp ve. Sharp 333 Ill. 267; Heppe vs. Sacpaneki 209 Ill., Manternach vs. Studt 230 Ill. 356 and People vs. Feicke 252 Ill. 414, in support of their contention.



In the Sharp case, the issue involved in the pleadings was whether the father, with whom commons had been left for his minor children, took the entire interest in the property, to the enclusion of his children. There the Supreme Court held that a copy of the summons for a minor defendant could not be left with a person who though not a nominal complainant, is a party interested and benefited by a decree granting the prayer of the bill filed.

In the case of Manternach ws. Studt, the court held that service upon the mother of a minor who was the creditor for whose benefit the property in question was sold and while not the nominal complainant, was the real party in interest, and stood in the position of complainant, was not good.

Who Feicks case, in which the rights of minors were not involved, was a petition in a quo warranto proceeding, where there was an attempt upon the part of one of the petitioners to serve a copy of the petition and notice, upon a board of directors, by serving himself, as clerk of the board, and is not in point.

In the case at bar, while there may have been a difference of interest in degree in the equity of redemption the pleadings do not indicate any adverse interest, as between the father and the miner children. Their interest in this court seemed to be not in conflict, so they all join in the writ of error. If as contended by plaintiffs in error the note was paid, it would be to the interest of all to defend: if not paid, the mortgages would have the right to foreclose the mortgage and sell the entire interest in the mortgaged property, regardless of ownership. We find no conflict of interest, as in the Mary case and the Reppe case. The chariff's return is the basis for a procumption that he performed his duty. That presumption to be overcome must be determined upon the face of the record.

Sharp vs. Sharp 333 Illinois 267. Upon careful examination of this record, we find no such conflict of interest, as would invalidate the service upon these minors, and divest the Circuit Court of Marion County of jurisdiction.

The fourth contention of the plaintiffs in error, that the guardian ad lites did nothing in the case except file a formal answer and took no steps to protect the interests of the minors or to call the facts in the case, which would have constituted a defense to the action to the attention of the court, follows in logical sequence with the first question

raised, that of proper service upon the minors herein involved. If there was any conflicting interest, as between the father and the minor children, as contended by plaintiffs in error, it would necessarily follow that that conflict of interest, should have been called to the attention of the court. As that question has been disposed of by our ruling upon the question of service, we do not feel constrained to hold that the guardian ad liter was develoct in his duty to his wards.

It is contended by plaintiff in error that the note evidencing the indebtedness secured by the sortgage which was foreclosed shows on its face, as offered in evidence, that it had been paid in full, prior to the time the enit was brought, and that the decree in question was entered solely upon the testisony of the complainant in the lower court, S. T. Johnson, who it is claimed was sholly incompetent and disqualified as a situate because all of the defendants in the case were defending as the heirs at law of Anna McGuire, deceased.

As to the first contention, the rule that a receipt in full is not conclusive and may be explained or contradicted is well established. Ditch. Adum. v. Vollhardt 82 Ill., 134, Estate of Switzer v. Gertenbach, 122 Ill. App., 26. Johnson testified that it was not paid. The adult defendant, Womer McDuire, joint maker of the note had every opportunity to present evidence to rebut the testimeny of Johnson as to nea-payment in full of the note, and apparently did not see fit to do so. This court does not feel called upon to weigh the testimony with reference to payment. And we do not feel called upon to make upon the competency of the witness Johnson, with reference to the escent proposition. In the absence of a bill of exceptions or certificate of evidence, it will be presumed that the findings were warranted by the proofs heard by the Sourt. In the absence of a certificate preserving all the swidence heard by the trial court, it must be presumed that there was sufficient oridence to warrant and sustain the finding. Hannas v Hannas, supra: Greenendyke v Coffeen, 198 Ill. 354; Macen v Mogan, 86 id. 16; Davis v American and Foreign Christian Union, 100 id. 313; Morgan v Cordies 31 id. 72; McIntoch v Semplere, 68 id. 128; Rhoades v Ricadec, 88 id. 139; Walker v Cary, 53 id. 470; Allen v LeMoyne, 102 id. 25; Menck v Mauck, 54 id. 381: Walker v Abt, 83 id. 236; Corbus v Teed, 69 id. 205; Brown v Hiner, 128 III. 148; Op. 156 Allen v Henn, 197 III. 486, Op. 491-2 and cases there cited.

For the reasons indicated above, the writ of error will be dismissed.



STATE OF ILLINOIS Abstract

APPELLATE COURT

OCTOBER TERM

A.D. 1939.

No. 29

AGENDA 24.

GEORGE WEINHAGEN, Jr., Administrator of the Estate of ALBERT VEINHAGEN, Deceased,

Plaintiff-Appellee,

Appeal from the Circuit

court of

Williamson County.

CITY OF HERRIN, an Illinois Municipal Corporation,

Defendant-Appellant.

STONE P. J.

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305 I.A. 158²

This was a suit on bonds Nos. 15 to 20 inclusive, of an issue in virtue of ordinance N_0 . 90 providing therefor, passed by the city council of appellant on March 8, 1909. Some two or three ordinances for the purpose of amending ordinance N_0 . 90 were passed from time to time after July 1st, 1909, but an examination of these ordinances shows that no substantive changes are made in the tenor or effect of ordinance N_0 . 90. They were simply made to clarify and make understandable the first ordinance.

Appellant through the years has paid bonds of this issue Nos. 4 to 14 inclusive, together with interest thereon. It undertakes to defend this suit notwithstanding the payments above indicated by saying that there was no Yea and Nea vote taken at the time ordinance No. 90 was passed and that said ordinance was never submitted to a vote of the citizens of appellant as prescribed by an act which went into effect July 1st, 1909,— months after the ordinance allowing the issue of bonds had been passed and approved by the city council of appellant. It requires but a glance to see that the act passed July 1st, 1909 requiring such



ordinance to be submitted to a vote of the people could not effect this ordinance. The bond issue comes by authority of the ordinance and the physical act of executing and signing the bonds does not govern. (McQuillan on Municipal Corporations, Vol. 5, page 4847, Section 2297; Chickaming Township vs Carpenter, 166 U. S. 663).

As to the Yea and Nea vote the record on that subject shows but one person absent from the city council and that the ordinance was unanimously passed. At this time and down until 1934 this was tantamount to a Yea and Nea vote. (Barr vs Village of Auburn, 89 Ill. 361). This case remained the law of the state on that subject until 1924,— that is, fifteen years after the issue of bonds here in question.

Neither of these contentions can prevail, as it seems to us perfectly obvious. Having taken that view, we regard it as unnecessary to discuss here the question of the city's being estopped to take the position it now takes. We might add, however, without deciding that question, the law of which seems to be well settled, that the city in this case ought to be estopped from denying this honest obligation the value received of which it has had, lo, these many years.

The trial court ruled correctly on this matter and its judgment in that regard is affirmed.

JUDGMENT AFFIRMED.

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STATE OF TLLTHOTS

APPELLATE COURT

October Term. A. D. 1939

Term	No.		and the state of t	A CONTRACTOR OF THE PARTY OF TH	Agenda	No.	
Earl	Williams.	The second of 1	A Committee of the Comm				

Plaintiff-Appelles.

VS.

Bertha Kraper.

Defendant-Appellant.)

Annual from the Circuit Court of Franklin County, Illinois.

305 I.A. 159

Dady, J.

The plaintiff, Darl Williams, who is the appollee herein. filed his complaint in forcible detainer before a Justice of the Peace against the defendant, Bertha Kraper, who is the appellant herein, to recover the possession of certain premises located in the City of West Frankfort, Illinois. The defendant, after service of summons on her, appeared and at her request was granted a change of venue to another Justice, who tried the case on May 5, 1939, and entered judgment on that date in favor of defendant. Plaintiff, with a surety, executed an appeal bond in the amount of 50.00. which bond was filed with and approved by the Justice on Jay 5, 1959. The transcript of the justice and the appeal bond were filed in the circuit court of Franklin County on May 17, 1959, and on the same day the defendant filed in the Circuit Court her demand for a jury trial. On June 28, 1959, the cause was called for trial and the defendant then moved to dismiss the appeal, which motion was denied and the cause proceeded to trial resulting in a julmment in favor of plaintiff. This appeal followed.

Defendant contends that the Circuit Sourt did not acquire jurisdiction of the appeal from the Justice of the Peace and erred in denying her motion to dismiss for the reason that the transcript

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The plaintiff. Carl Williams, who is the arceller berein. and "s weld it a evaluate tonialth additional at intelleran and fall Just a part of the Calman, the last the care of the last and the last bright, by convey the proposition of match pressure to adjoint the City of Yest Frankfort, illiancie. The defendant, after porvice or number a fethere and theory would be her tipe of the control of of verms to santher Juities, we tried the case on his t. 1993. . Valgale III . ducing to the tower of code to the confidence for the land of the confidence for the code of the c with a samete and an arreal farme of the orders of the orders. . Old at you we entance with the haveners had did held out beed didn't off of hell's crew took law to end how sold of and to independent of circuit sourt of Franklin County on May 14, 1983, and on the some part is not bound but part bloods and all healt butterful and the MALL DE Just his twill the close the utilize the total set in Fairn's are moisted deliver, Longon cals natural of heves redd frachrolich ners' at the fact a at relative a tabel of felecoons outer all the . bewelift inegra abit . This well

policy as son this special that the viscomit vourt his not as print jurishing to the special from the doubles of the page and some sons in despite the time to them to the the the transmission to them to the transmission to the

from the Justice of the Peace falls to show that the plaintiff prayed an appeal or that the Justice fixed the amount of the appeal bond. This contention is without force. The appeal bond was in fact entered into by the plaintiff and his surety and was filed with the Justice and approved by him within the statutory period of five days after the entry of the judgment.

The entering into and presentation to the Justice of the appeal bond for approval was all the praying for an appeal that was necessary, and the approval of the bond by the Justice was a sufficient fixing of the amount. (Fix v. Quinn, 75 Ill. 232; Enright v. Rehbach, 133 Ill. App. 50; Natenberg v. Solak, 174 Ill. App. 443.)

The fact that an appeal was or was not prayed on a certain day may be shown by evidence other than the entries on the justice's transcript. (Lambert v. Dabbs, 302 Ill. App. 400; Cachron v. Sweigle, 213 Ill. App. 594.)

Moreover, as stated the defendant on May 17, 1989, filed in the circuit court her demand for a jury trial. This amounted to a general appearance, and she did not make the motion to dismiss until the case was thereafter called for trial on June 28, 1959. My appearing generally in the circuit court the defendant waived the question of the jurisdiction of the circuit court on appeal. (Chicago Paint and Wallpaper Company v. Mollahan, 67 Ill. App. 601; Davison v. Heinrich, 340 Ill. 349.)

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Defendant complains of cortain alleged errors in the admission of evidence and questions the sufficiency of the proof to sustain the trial court's judgment. No report of proceedings of the trial appears in the record, and in the absence of such report such errors, if any, are not before this court for consideration.

Judgment affirmed.

Abstract

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STATE OF ILLINOIS

APPELLATE COURT

October Term. A. D. 1939.

Torm No.	Agenda No.
Francis J. Skye,	Mreal from the
Plaintiff-Apellee,	City Court of
VS. Francis J. Skye Distributing	East St. Louis, Illinois.
Company, a corporation,	Mon. Wesley E. Lueders, Judge Presiding.
Dedy, J.	305 I.A. 159 ²

Defendant. Francis J. Skye Distributing Company, an Illinois corroration, brings this agreed from a judgment of the city court of East St. Louis in favor of plaintiff Francis J. Skye.

Dady. J.

Plaintiff's complaint charged that defendant owed plaintiff 11.279.00 on several different claims. Defendant filed an answer denving any indebtedness, and a counter-claim in the sum of \$1,042.26. No question of pleadings is raised.

The case was tried without a jury. The trial court entered judgment in favor of plaintiff in the sum of \$820.10, and entered judgment against the defendant on its counter-claim.

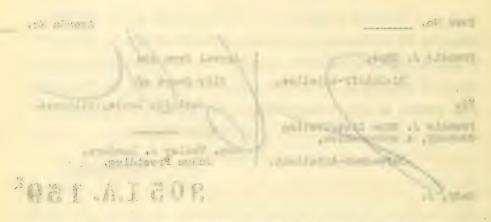
Of the items going to make up said sum of \$820.10, only two are distuted by the defendant, namely, an allowance for \$500 for personal services of plaintiff and an item in the sum of \$57.10 hereinafter referred to.

On June 6. 1938. plaintiff and his wife, Marion Skye, as parties of first part, and Louis E. Levy, agent, as party of second part, and Francis J. Skye Distributing Company, a corporation, as party of third part, entered into a written contract, which recited that the first parties owned, controlled and operated a certain liquor business; that third party had recently been

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isfaminate Francis J. Skys Materialization Commung. or Illinois sorroration, brings this as sal from a judgment of the star search of Mark St. Louis in Savor of plaintiff Spansis J. Thro.

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On June 8, 1889, plainfirs and line wife, stron input of parties cart, and leming ... isyr, scent, or correction, second part, and branche. J. Sire Directivity Company, a correction, as party of third part, entered into a critical contract, which a cortain liquer buriases; that third carty inc recently heap

organized as a corporation to engage in the liquor distributing business: that it was the intent of parties of first part to sell. transfer and assign to said corporation all of the good will, merchandise and other assets then owned by first parties: that first parties contemplated owning and desired to sell all of the capital stock in said corporation to second party or his nominees. and second party desired to purchase such stock on terms therein set forth. So far as material, said contract then stated that, in consideration of one dollar and the mutual covenants, the parties agreed, among other things, in substance as follows: First parties agreed to execute bills of sale to said corporation covering the assets then owned by first parties, describing the same, at prices fixed in said contract, the same to be paid for on or before June 15, 1938; that first parties agreed to sell and second party agreed to buy all of such cavital stock at a certain price; that first parties agreed to devote all of their time and energy promoting the good will of said corporation until July 15, 1958, for a reasonable compensation; that first parties agreed to submit to said corporation, at the time of sale and transfer, duly executed resignations as officers and directors of such corporation, effective July 15, 1958, or at such earlier date as might be determined by second party; and that said corporation agreed to promptly account for and pay over to first parties all moneys received by said corporation in connection with the accounts receivable of first parties, determined as of close of business on May 31, 1938, which accounts receivable were to remain the property of first parties.

It appears that on or prior to July 15, 1938, the contract was consummated.

On January 1, 1939, Marion Skye assigned to the plaintiff all of her interest in the contract.

present at a correction to encare in the liquer distribution Pusinees; that it was the intention carties of first yest to sell, truncter and ancies to said occuration all of the root will. merchandles and other accets then comed by first marriage that aft to fig fire at Legiou. For twitten Persistence asityer serit confibel cust is call asserted by a construction of the modification act Combo, jos Cou de entental, a la compost the entelligible in commission of many daller and the material of very and the miles creed to execute bills of sale to sail ocuropanico covering the name (m. then erecally first parties, isotalbire (is tyre, of trioth fixed in raid combract, the same to be paid for an or before June 15, 1928; that first extine sursed to call and second purer rows to the mileson of the latter lattered forth To file not of your threat a pair about the ile obover or four a reity a Jami's cromating the east till of reid one empting meth daily left, i-17. dirius es Deers estinte jant filet filent permise elfacet es a reto seil sorrewation, at the line : "als and :: . aulte, aulte, at the residuations as officers and directors of such correction, effective July 15, 1882, or at cuch emplier inte as might be istermined in record runty: and that raid correction a read to meratly accurat bing yo bevises are the series Jeri'l of seve yer ham to't corroration in connection with the accounts receive'le of first pertion, determined as of close of business on try 21, 1938, which assounte receivable were to retain the proporty of first tarties.

It's little in the contract.

It appears the t on or prior to July 15, 1939, the centract was

Plaintiff testified that from the date of the execution of said contract until July 15, 1938, he remained with and managed the business of the corporation, working "day and night, regularly and steedily," "breaking" new men into the business, lining up salesmen and selling merchandise in the place of business of defendant and on the road, and that a reasonable compensation for such services would be \$125 per week. From the record we believe the court was justified in believing his testimony and that \$500 was a reasonable allowance for such services of the plaintiff.

Defendant next contends that said contract was illegal for the reason that compensation was voted to officers of a corporation by resolution carried by a vote of the officers to be compensated, - plaintiff being the president, and plaintiff and his wife and one other person being the sole directors of said corporation at the time said contract was entered into. Inactuch as defendant accepted the benefit of services of the plaintiff, which were outside of his duties as president of defendant, the defendant is liable for reasonable compensation for such services regardless of the contract. (Bloom v. Vehon Company, 541 III. ECC; Voorbees v. Mason, 245 III. 558.)

As to the disputed item of \$57.10,- plaintiff testified that on June 13, 1938, and after the corporation, pursuant to said contract, took possession of the stock of roods theretofore owned by plaintiff and his wife, \$65.00 worth of such merchandise was stolen and that on July 1, 1939, when plaintiff and defendant settled or partially settled their accounts the defendant withheld \$65.00 from plaintiff, and that Er. Alpern, the succeeding tresident of the defendant, at that time told plaintiff he would be paid therefor when the insurance on such stolen merchandise was collected.

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by plaintiff and his vife, 'At.'' worth of each rerohemies ver
violen and that on July 1, 1959, when plaintiff and defendent withheld
led or vertially nebtled their accounts the defendent withheld
of the Jefendent, as that the told plaintiff he would be reid
threafer when the incurrence on ruch release was collected.

Alpern as a witness for defendant testified he knew of the stolen liquor, that "if I owe Mr. Skye anything, I owe him \$57.10 not \$65.00," and that no adjustment had been made with the insurance company on the stolen liquor. Plaintiff's right to recover was not dependent on the collection of such insurance, and the court was justified in allowing such item.

Defendant's next contention is that the court erred in not allowing its counter-claim, which if allowed would have more than offset the claim allowed plaintiff. This counter-claim is based entirely on the charge that one Brigsby, who was a salesman for plaintiff and his wife before and at the time of the organization of the corroration. and who thereafter continued as such sales an for the defendant corroration, collected between June 1, 1935. and July 15, 1938, moneys from the sale of merchandise relocation of defendant and, without the consent, but at the direction of plaintiff, turned such moneys over to plaintiff to apply in payment of accounts due plaintiff and his wife. prior to June 1. 1938, from the same customers. We do not feel required to go into any lengthy ilecussion of the evidence on this issue, but consider it sufficient to say that the record does not show that any money collected by Grigsby on the sale of merchandise belonging to defendant was actually used in payment of plaintiff's accounts receivable.

Defendant complains of the refusal of the court to admit in evidence a certain exhibit. This exhibit is not abstracted, hence defendant is in no position to raise the question. (Rehfus v. Mill, 243 Ill. 140.)

The judgment of the trial court is affirmed.

Affirmed.

AUSUECU

Alpern as a witness for defendant is strike in branch of at a steller literar, since "if" i ord is. Single anything, a ord bin fav. if not 100.00," and that no atjunctout is i been to a with the introduced or range on the accient liquid. This intiffic pinks to exact the not deposited on the scale of the continuous, and the scare was justified in other steel these.

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STATE OF TILINOIS

APPELLATE COURT

Abstract

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FOURTH DISTRICT

October Term, A. D. 1939

Term No.

rerm No.

THE PEOPLE OF THE STATE OF

ILLINOIS,

Defendant in Error

VS.

TED HOLZHAUER and MARY WEATHERLY,
Plaintiffs in Error

Writ of Error to the County Court of Clinton County, Illinois, No. 9

Hon. William Ragen Presiding Judge.

305 I.A. 160'

DADY, J.

On February 25, 1939, the State's Attorney of Clinton County
filed in the county court of that county an information charging that
the defendants, Ted Molzhauer and Mary Weatherly, on January 4, 1939,
in said county "unlawfully * * * did live in an open state of adultery and formication, not being married to each other, but Ted
Holzhauer was then and there a married man and not legally divorced
from his wife; and that Mary Weatherly was then and there a married
woman and not legally divorced from her husband," contrary * * * etc.

A jury found both defendants guilty "in manner and form as charged."

Motions for a new trial and in arrest of judgment made by each defendant were overruled, and the trial court entered a judgment of guilty as to each defendant, to review which defendants have sued out a writ of error.

Defendants contend that the information is defective in substance in that it fails to state that defendants lived "together"

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or with whom either defendant was living. The record does not show that any motion was made to quash the information. The motion in arrest of judgment merely states that the complaint "does not state an offense against the penal laws." In our opinion, although informal, the information sufficiently charges defendants with a violation of the Statute in question. (Crane 55% v. People, 168 Ill. 395; People v. Love, 310 Ill. 56%.)

Inasmuch as the information specifically charges that each of the defendants was married at the time of the commission of the alleged offense to a person other than the co-defendant, the information in effect charged each defendant with living in an open state of adultery, - and not in a state of fornication, and this is true although the word "fornication" was used. In order to convict either defendant of living in an open state of adultery it was necessary for the state to prove that such defendant at the time of the commission of the alleged offense was a married person and had a spouse living. (Lyman v. People, 198 Ill. 544; Miner v. People, 58 Ill. 59.)

The defendants contend that there is no evidence tending to show that either one of them was at the time of the commission of the alleged offense married to some person other than the co-defendant.

The case is presented to us on a stipulation of facts signed by the State's Attorney in behalf of the People, and by the defendants, by their attorney, which stipulation was approved

or with then either defendent was living. The record does not show that any motion was unde to quash the indometion. The mation in arrest of judgment notely attuce that the complaint "love not state an offense against the ponti laws." In our scendents with a violation of the tetute in question. (Graga 55 feedent, 168 Th. 598; inequals v. leve, 500 Th. 598.)

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The defendants contend that there is an evidence tending to the that either one of them was at fee time of the comission.

In allegal offunes wereled to the person other time co-defendant.

The case is precented to us on a cipulation of facts signed by the State's Atterney in behalf of the People, and by the autorney, rinch stipulation was approved

by the trial judge and filed in the trial court. This stipulation states that no reporter was present at the trial and that there was no stenographic report of the evidence. It states that such stipulation is a "true and correct record and transcript of the proceedings had," and then states what evidence was adduced and concludes with the statement that "all facts not incorporated in the transcript" were waived. We have carefully read such stipulation or "transcript" and in our opinion it does not appear from such stipulation that any evidence whatever was introduced which showed or tended to show that either defendant was married and had a spouse living at any time prior to the filing of the information and within the period covered by the statute of limitations.

In his printed brief the State's Attorney states what he claims certain witnesses testified to on the trial, but such alleged testimony does not appear in the stipulation or in the abstract or record, - and hence cannot be considered by us. We can only consider the record as presented.

The cause is reversed and remanded.

Reversed and remembed.

Abstract

by the trial judge and filed in the trial court. This etipulation obstace that the recorder was present as the trial and that there was no atenographic return of the evidence. It states that auch stipulation is a "true and correct recurs and brancouring of the stipulation is a "true and correct recurs and brancouring of the concluded with the transcript of the stipulation of the transcript with relation to have corrected to account attipulation or "transcript" and in exercipiates it does not copies which shows to the account at a correct of the stipulation state of the correct of the stipulation state of the correct of the country at any time prior to the filting of the condition and anyone living at any time prior to the filting of the

On the printed brief the ptrice Attenday states what he ciaims contribe print is such although a standard to the trial, but such alleged to the trial from it and abstract or readment is each and hance councit be considered by us. We can only

e is reversed and recado.

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Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

305 I.A. 160²

BE IT REMEMBERED, that afterwards, to-wit; On APR 61340 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:



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The trial resulted in a verwint and jubrisht i "or 19,255.40 and defendant in apparied.

record discloses that Indon's embatter a retail

of the in Calus and in addition to the police of the

ich forms the basis of this unit, expanse had in

merchandise and firtures. Upon two of these policies aggregating \$9,000.00 appellee brought suit and recovered a judgment for \$9,259.95, which was sustained by this court. Sundquist v. Hardware Mutual Fire Ins. Co., 296 Ill. App. 510. Thereafter the judgment of this court was affirmed by the Supreme Court. Sundquist v. The Hardware Mutual Fire Ins. Co., 371 Ill. 360.

The facts with reference to the origin of the fire and the financial condition of appelles sufficiently appear in these opinions of the Supreme Court and of this court and need not be repeated. Upon the thial of the instant case the defendant contended, as did the defendants in the former case, that the fire was of incendiary origin and there was evidence tending to establish that differse. In his opening argument to the jury one of appellac's attorneys referred to the fact that one of the defenses interposed by the defendant was arson, which counsel asserted must, under the law, be proven by the defendant beyond all reasonable doubt. Counsel for appellant objected and the court overruled the objection and counsel for the plaintiff then said: "They must prove beyond all reasonable doubt, as I told you in the beginning, what they had to do". In his concluding argument to the jury, another of plaintiff's counsel in commenting upon the defense that the fire was of incendiary origin. "That is the way it looks to me. People are presumed to be honest and righteous unless the contrary is shown. Therefore the law places upon these men the burden, if this man has committed a crime which excuses them from meeting the provisions of this contract, then they must come here with evidence that shows him guilty of the crime of arson beyond all reasonable doubt".

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fore point within their air or compressed in agent of the ensaid of the order of the self-order of the self-order of the self-order. where a first the contract section of the extraction of the contract of ent dest live on the common and removed the back with the state of of this position are said in a minima grainment to see graf of the many rathers will at the art is sent dutificate cals for which that doubt out of hemotism emperature alocalisms to be Losares folia, a esca un entarable del gó Secomporal escala de being the following the product of a particle particle forms because a all to be most do thank or total formula . Mand the moor ile model 1918 to 1920 and to appear they called by any profession of the profession of the contract of the contra that the beginned by the bar and the confidence of the agreement to the figure of the fitting by the words of the fit of them and of learners one aloget ten in make to be the the the state of the the be benegated and significate unitary size or signification as "Harefore the law places once thrope new was buck , if I like the committed eidi he anoimivory siv yrillein neth mair despene deidir smine great, then blow squar oor a here with swidenes when shows him entity of the entire of trees beyond till reasonable darkt.

Counsel for defendant again objected. The court overruled the objection and counsel for plaintiff then continued: "We contend that is the law and the court sustains our contention this far in the argument at least". In this connection counsel for defendant tendered to the court the following instruction which was refused. "The Court further instructs the jury that if you believe from a preponderance or greater weight of the evidence that the plaintiff, with intent to cheat and defraud the defendant, wilfully and maliciously set fire to or cause to be set fire to or burned or caused to be burned, the property described in the policy of insurance sued on, then your verdict should be for the defendant".

This refused instruction set forth in the opinion of the Supreme Court in Sundquist v. Herdwere Mutual Ins. Co., supra, at page 363. That case overruled Rost v. Noble and Co., 316 Ill. 357 and the cases therein cited, the court stating that the reasonable doubt rule which required proof of the commission of a felony beyond a reasonable doubt, either as a cause of action or a defense in a civil suit would no longer be adhered to in this state and expressly held that this instruction should have been given. The court concluded, however, that the refusal to give this instruction did not require a reversal of that judgment inasmuch as the record disclosed that no instruction was given saying anything about reasonable doubt but did disclose that an instruction was given which required a finding for the defendants if it was shown by a preponderance of the evidence

Compared for Larenders a gain objected. The court everted the objection and community that the sometimed: " a centend that the the last court creties our contention this fer is the trace our contention out of the first court is the required that is the reduced that is the restrict out of the restrict of the restrict out of the restrict of the restrict out of the restrict of the restr

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that the plaintiff had falsely sworn that he was ignorant of the origin of the fire. The record in that case also disclosed that a special interrogatory had been submitted to the jury which specifically found that the plaintiff did not swear falsely when he said the easue of the fire was unknown to him. It likewise appears from the record in the instant case that appellee aid not request nor did the court give any written instruction requiring proof of anything beyond a reasonable doubt and the ninth given instruction in the instant case is identical with the tenth given instruction as appears on pages 305 and 306 of the opinion of the Supreme Court in the former Sundquist case. However, no special interrogatories were submitted to the jury in the instant case. The record here then differs from the record in the former case in two particulars, first the absence of a special finding to the effect that the plaintiff did not swear falsely when he said the cause of the fire was unknown to him and second the errowerus statement of the law made in counsel's argument to the jury which the trial court sanctioned. The record discloses that appellee only requested one instruction which was to the effect that if the jury found the issues for the plaintiff that interest should also be allowed. Appellant tendered twenty-two instructions, fifteen of which were given as offered, one modified and six refused. In none of them werethe jury told that they should be governed by the law as found in the instructions. The statement of the applicable law enunciated by counsel for appelles in their argument was erroneous. The trial court should have sustained an objection thereto. The only conclusion the jury would have been warranted in arriving at after

in the state of our of rule comman wirelet had intimined add todi the order of the view view, the reservant and the constraint of the characters. Hotelman in the commercial consecution of the deposition in the consecution of the consec Alexaldo apeto dos ala Cirióni fo car podi pouco ellegizioses -original . In our time, we saw this country speed and fine and such the contract from the description for the feature asset the feature of the a transport of the transport of the days of a few comments of the nda po ala a pi trejser a trajer minim to trene sminimes The fet are dut sense or organism as modernment work with or ent the opinion of the Legal Action of the control and the Legal of the control and gard and ad autoferem erect to be be the hope and Astoons on in the increase ones, The recent care than Alivers than the - como da chio i como como da co prociona esta cina i bacco June 187 and and a time a for a standing and and battle fulname a for order felander often in acte the education of the virality again a lectured all where was and in the solution of the constant and according was about the old property of the court of the state of the and though our calconnect when we lead of built encolonable broker off for asset and land your off it field foothered or arm relate -coloration continuo seria efecte procede fode Tribelelo denied brongprend ingerprending, thirteen of this reas alseen us addenouse to some all transment of the foliation one tree to out il land, the tall one of hometwoo so bloods your feld blod you instructions. The statement of the smeller but admirable by compact for another the engagement site of terms not league of court should have problems an elipsotion arreduct the talk ocnolusion the furr monid have been terranded in hariving at after

the court had overruled counsel's objection was that defendant must prove this particular defense not by a preponderance of the evidence but beyond a reasonable doubt. Under the holding of the Supreme Court the refusal of the tendered instruction under the facts as disclosed by this record necessitates a reversal of this judgment.

It is also insisted by counsel for appellant that the record discloses appelled to have been guilty of such fraud and false swearing after the loss as to render the policy sued on void under the provisions of the policy and it is insisted that the record is entirely different in this respect from the record in the former case. It is also insisted that the verdict of the jury on the issue of the extent of the loss is against the wanght of the evidence. Inasmuch as this case must be submitted to another jury it is not necessary for us to consider these alleged grounds for reversal and we refrain from expressing our opinion as to the weight of the evidence upon these issues. Neither is it necessary for us to pass upon the alleged improper remarks made by counsel for appellee in the presence of the jury during the progress of the trial or the refusal of the trial court to sustain appellant's challenge to the array of petit jurors.

The is also insisted that the trial court erred in permitting Theodore Sundquist, a son of appellee, to testify that in his opinion the actual cash value of the herchandise in appellee's store on May 1, 1936 was between sixteen and twenty thousand dollars. His testimony disclosed that he was working in the Galva store and assisted his father in making up the invertories of that date which were offered and admitted in evidence. His testimony further disclosed that at the time of the hearing he was employed, and had been for a year and a half, by dears, Roebuck

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and Company in Chicago in the office of the Merchandise Superintendent of that company and that his daily work had to do with watching the prices and price changes of furniture, rugs and all lines of merchandise. He testified that before going to Chicago he worked as a salesman in the Galva store for his father about three years, was familiar with the stock, had handled most of it. knew the wholesale and retail values thereof and had called off the various items of merchandise to his father at the time his father listed it in the inventories referred to. He was crossexamined at length by counsel for appellant and gave his opinion of the value of certain items inquired about and was unable to do so as to others. In our opinion his testimony was competent and the weight to be accorded it was a matter exclusively for the jury. The trial court refused to admit in evidence a certified copy of the bankruptcy proceedings and appraisers' report which disclosed the purchase of the Emery stock by Sundquist in 1922. In view of the condition of the record at the time this offer was made, we are inclined to think it was admissible. The other error complained of occurred while J. W. Sundquist, a brother of appellee, was on the witness stand. He testified that a peano frame found in the debris after the fire was a "Vose" piano. The plaintiff ffor his seat at counsel's table in an audible voice said: "Schiller piano". Counsel for appellant moved the court to direct the reporter to insert in the record this occurrence which was done, the court stating: "All right. The Court will allow that, as the court heard it himself". Nothing further appears in the record. Of course it was improper for appellee to have made this statement. The court did everything which counsel for appellant requested. All of it occurred in the presence of the jury and will not occur again.

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For the reasons indicated, the judgment appealed from will be reversed and the sause remanded.

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STATE OF ILLINOIS, SECOND DISTRICT	
SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the	e State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a	true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and thirty-
	Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff 305 I.A. 161

BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

AGENDA NO. 2

IN THE APPELLATE COURT OF ILLINOIS.

SECOND DISTRICT

FEBRUARY TERM, A.D. 1940.

IN RE: THE CONSERVATORSHIP OF HERMAN R. HIRE. an incompetent person, BESSIE L. HIRE, Conservatrix, etc.

Appellee,

VS.

FIRST NATIONAL BANK OF PEORIA.

Appellant.

APPEAL FROM CIRCUIT COURT HENRY COUNTY.

HUFFMAN - J.

This is a proceeding brought by appellee to reclaim a certificate for 50 shares of stock from appellant. The action was brought under Sec. 7 of the Uniform Stock Transfer act (ch. 32, sec. 416, Ill. St. 1939).

The certificate of stock was endorsed in blank by Mr. Hire. He placed it with Rogers & Company, brokers located in the city of Peoria, Thereafter, Rogers & Company pledged the stock with appellant as security on a loan. This loan was paid and the stock again came into the possession of Rogers & Company. It was thus pledged by Rogers & Company with appellant several times, and each time redeemed by payment of the loan, until March 23, 1938, when the stock was again pledged by the brokers to appellant for \$1250. It has not been redeemed from that loan.

Following the appointment of the conservatrix for Mr. Hire, a letter was written to appellant bank by the attorneys for the

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HERMANN - J.

This is a presenting brought by speakles to reclaim a cortificate for 50 charse of stock from appellant. The action was brought under Sec. 7 of the Uniteral Seck Frankfer act (ch. 32, sec. 416, III. 32. 1937).

The certificate of scoon was encoreed in blank by if.

Wire. We placed it with hoters Coverny, brokers located in

thr city of Feoria. Thereafter, Avgers & Company pledged the

stock with appellant as scourity on a loan. This loar was paid

it was thus pledged by Hogers & Company with appellant several

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1 23, 1935, when the stock was again pledged by the brokers

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conservatrix, advising the bank of such appointment, and requesting information regarding any accounts or property of Mr. Hire that might be in its possession. This letter was written under date of November 20, 1937. Two days later, appellant by letter, advised the attorneys for the conservatrix that it had no accounts of Mr. Hire's on its books.

When it was discovered by appellee that the certificate of stock was in appellant's possession as security for a loan to the brokers, this petition was filed in the county court for citation to cause appellant to appear with respect to recovery of the property in question. (ch. 86, sec. 54, Ill. St. 1939). The county court dismissed the petition and discharged appellants. The conservatrix appealed to the circuit court, where the question was resolved in favor of appellant by jury. Following return of the verdict, appellee filed motion for a new trial, which motion was granted, and appellant brings this appeal from the order of the circuit court granting the motion for a new trial.

While the trial court might well have denied the motion for a new trial, yet the case contained questions of fact as well as law, and a trial court has a wide discretion in this regard. He has the advantage over this court, as he hears the witnesses testify, and for this reason, we are reluctant to change the order of the court with respect to the granting of the motion for a new trial.

The letter written by appellee to appellant advising it of the conservatorship of Mr. Hire's estate, was written under date of November 20, 1937, which was but four days following the appointment. The stock was placed by Mr. Hire with

conversation, advising the bank of much sprointment, and rereceiving information regarding any accounts or proceedy of Mr. Hire that light be in its possession. This latter was written under date of Hovember 20, 1937. The days latte, appellent by letter, edvised the entermy for the conservatrin that it had so accounts of Tr. Hire's an its brane.

Then it was discovered by appointed that his continients of stock was in appoint to proceed a sound to the brokers, this position was filed in the county court for eitetion to cause expelient to appoin with remost to recovery of the property in question. (ed. %), see. §4, III. (t. 1993). The county court disclosed the petition and discharge expelients. The county court disclosed the petition and discharge expelients. The county appealed to the circuit court, where the question was resolved in fever of appellant by jury. Tellewing rettern of the verdict, appelles filed motion for a new trial, which notion was granted, and appellest trials this appeal

This the trial court might well have denied the action for a new trial, yet the case contained questions of fact as less, and a trial court has a wide discretion in this well as less, and a trial court has a wide discretion in this regard. He has the adventage over this court, as he heard the witnesses testify, and for this reason, we are relucted to change the order of the court with respect to the granting of

The letter written by appelles to expellant advising it of the conservatorship of Mr. Mire's estate, was written under date of Movember 20, 1937, which was but four days following the appointment. The steek was placed by Mr. Mire with

the broker on October 6, 1937, and on that date the broker pledged the stock with appellant as security for a loan. This loan was shortly paid, and the stock again pledged on October 9, 1937. This loan was paid on November 29, 1937, and the stock again pledged on March 4, 1938. This loan was paid on March 14, 1938. The stock was pledged for the last time on March 23, 1938. It is the position of appellee that by virtue of the above section of the Uniform Stock Transfer act, she has the right to reclaim the same from appellant.

Under the evidence in the case, we hesitate to reverse the order of the trial court in granting the motion. Where questions of fact exist, an order granting a motion for a new trial will not be disturbed, unless it appears there was an abuse of discretion in granting such motion. Carter v. Geeseman, 303 Ill. App. 281, 285.

The order granting the motion for new trial is therefore affirmed.

Order affirmed.

y an Ostober 5, 1937, and an that this broker he steek with upsailunt as security for a lost. This loan was abortly paid, and the steek spain pladged on October 9, 1937. This lean was paid on Movember 29, 1937, and the steek arain pladged on taken it. 1936. This loan was paid on Parch 14, 1936. The loan was paid on Parch 14, 1936. The loan was paid on Parch 14, 1936. The stock was placed for the lass time as Serve R3, 1937. It is the position or applicate that by righted of the sterm asserted of the Uniform Rack Interested act, she

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order at a time order the rotice for her trill to therefore affirmed.

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STATE OF ILLINOIS, ss.		
SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and	
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for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby		
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,		
of record in my office.	To the time of the second of coid	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said	
	Appellate Court, at Ottawa, thisday of	
	in the year of our Lord one thousand nine	
	hundred and thirty	
	Clerk of the Appellate Court	

(73947)



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

FUBRUARY TEMS, A.D. 1940.

WILLIAM KELTZ, Jr., a Minor, by William Keltz, his next friend;

Appellee.

W.S.

FRANK C. WICODH US, Jr., as Receiver of the Wabash Railway Company, a Corporation, et al.,

Appellants.

ROBERT KELTZ, a minor, by William Keltz, his next friend,

Appellee,

vs.

FRANK C. NICODEMUS, Jr., as Receiver of the Wabash Railway Company, a Corporation, et al.,

Appellants.

WILLIAM KULTZ,

Appellee.

VS.

FRANK C. NICODEMUS, Jr. as Receiver of the Wabash Railway Company, a Corporation, et al.

Appellants.

APPHAL FROM CURCUIT COURT
WILL COUNTY.

HUFFMAN - J.

William Keltz, Jr., and Robert Keltz, minors, instituted their suits by their father William Keltz, as next friend, to

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below in the rate being being relative of the party and th as the left from the follow will be such that of other shall be recover for personal injuries sustained in a collision between an automobile which they were operating, and one of appellants' trains. The father, William Keltz, brought his suit against appellants to recover for loss of services of his sons and for damages to his automobile, which was involved in the accident. The three cases were consolidated for trial. Verdicts were returned in favor of each of the plaintiffs, and this appeal follows from mudgments rendered thereon.

The suits were brought against appallants as receivers of the railway company and John A. Filbert, the engineer of the train involved in the accident. The complaints charged that the defendant receivers, through their servant, defendant Filbert, operated the train in a negligent manner by failing to give any warning of its approach to the crossing in question, as required by statute. The jury returned a verdict in each case, finding the defendant angineer not guilty, which removes from present consideration the question of the negligent operation of the train.

The complaints further charged appellants with failure to install automatic signal devides at the crossing; alleged that the crossing was a hazardous one; that appellants did not have the crossing properly marked with sigh posts to warn persons that it was a railroad crossing; that the planking used at the crossing was not proper and did not comply with the effective orders of the Illinois Commerce Corrission; and that the view north along the right-of-way, was obstructed.

The railway track ran north and south. The road being travelled by appellees ran east and west. Appellees were approaching the railroad crossing from the west. About two hundred fifty feet north of the crossing, the tracks of the

trains. The received falling Relies to his note against appoint to receive and for appoints appoint to receive a far loss of acrises of his accessor. In loss of accessors, and the accessors were consolidated for trial. Interestable to receive a falling and this accessors the receive at the plaintitie, and this appoint a receive a terms.

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the administration of the charges are consistent and that the reservoir with that the view with the charges are the charges and that the charges are the charges are the charge of the charge was abstracted.

fluor track two nerth and double. The read being the values were apthe railrest crossing from the west. About two feet nouth of the crossing, the tracks of the Michigan Central cross over the tracks of appellant, by an overhead crossing, which is referred to in this case as the viaduct. Appellees urge that due to obstructions to the view between the crossing and the viaduct, and due to weeds and vegetation which appellants had permitted to grow up along its right-of-way, their view was so obstructed that they could not see the approaching train.

The question of warning signals, with respect to the crossing itself, is not controlling, as the evidence of appellees disclose that they were familiar with this crossing and upon their approach to it on the day in question, brought the automobile to a full stop about eight feet from the track, and looked in both directions to see if a train was approaching, before proceeding further. The question with respect to the planking upon the crossing, is not a controlling feature, as it had nothing to do with the accident. It appears from the record, that the only question of negligence which could be attributed to the railway company, would be the growth of weeds and vegetation that appellees allege were permitted to grow and accumulate on the west side of the track and to the north of the highway, thus obstructing the view between the crossing and the approach of appellants' train from the north.

Appellees William, Jr., and Robert Keltz, were living with their parents on a farm somewhere in the vicinity of this railwoad crossing. The accident happened on Sunday, July 14, 1935, at about five-thirty in the afternoon. It was a bright, clear day. The two boys left home in their father's car at about two o'clock that afternoon. They met two young ladies with whom they spent the afternoon at various parks and pleasure resorts. Part of the time they were accompanied by Robert

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Appellone Militer, Wr., and Where Malks, ware tiving the their receives on a farm somewhere in the vicinity of Man.

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and Charles Tracy. Toward evening, the party of six left
Michigan Beach and appellees took the Tracy boys home, whereupon they started toward their home with the two girls. The
road over which they were travelling just prior to the accident, is a rather unimproved country road, rough from ruts
and holes. They were approaching the crossing in question
from the west. The west end of this country road had been
gravelled at one time. The gravel ends shortly to the east
of the crossing in question, and from there on, the road is
an unimproved dirt road. The photographs show that the travelled portion of this highway is what is commonly called a one
track highway. The road is referred to by the witnesses as
the Steele Road and is about a mile south of New Lencx.

Robert Keltz received a head injury and does not remember anything about the accident. William, Jr., states that Robert was driving the car at the time and that he was sitting in the front seat to Robert's right. He further states that as they approached this crossing, the car was brought to a full stop about eight feet west of the track; that he and his brother Robert looked north and south to see if there were any trains approaching, and if the way was clear. He states they saw no train approaching, and that his brother stabted the car forward to cross the track; that when they were about to go upon the west rail, he saw the train for the first time; that it was right in front of them; and that he grabbed the steering wheel and turned the car to the right, which would be to the south and in the direction the train was travelling. The front end of the automobile was struck by some portion of the engine. The car was thrown over in the ditch to the south of the highway and on the west side of the railroad right-of-way.

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The evidence shows that the highway is about two feet higher than the ground along the north side thereof. This fact is borne out by the photographs in evidence as introduced by appellees. The photographs do not indicate that the grass and vegetation was such as to obstruct the view of the railroad track or to obstruct the view of approaching trains. William, Jr., states that the car was stopped about fifteen or twenty seconds while he and his brother Robert locked up and down appellants' track to see if a train was approaching. According to his evidence, he never saw the train, nor heard it, until it was right in front of them, and when they were so close to the track that the front end of the car was struck by the train. This was a railroad crossing on a country road, out in the open country. There appears to have been no other traffic on the highway at that time, and no noise or confusion to prevent one from hearing an approaching train. His svidence that the car was brought to a full stop close to the track, is correborated by his witness Bobbitt, who lives by the crossing. He states that he saw the car pass his house approaching the crossing; that he knew the car and knew the boys; that he had seen them drive along this read and over this crossing at previous times. He states that the car was brought to a full stop before reaching the track; that it was then started forward and was creeping along at about one mile an hour as it approached the track; that he watched the car during the entise time and saw it operated up to the crossing, saw the train coming, and saw the accident. This witness says that the front end of the car collided with the engine, throwing the rear end of the car around to the north and in contact with the baggage coach, whereupon the car was knocked into the ditch on the south side of the highway and on the west side of the track.

THE OWNERS OF THE PARTY AND THE PARTY HAVE BEEN REF. glal . Treat to the north bile dotte and and and the lections at the percentage of the project of the series at the lection of the lec by aprollers. The photographs to an indicate the the enter and veretainted were avele to vereinforce that the the consistence of the read trees on to absorve the nate when all acceptable to the the state of the state of the same and the same of the on defined decise and and his bus ad addin abases we ment to . ricers for the the things of fears introlled a cob bes Assorbing to his oreigna, it is the own of the continuous A now that your last year for expert an excess on \$1 Mine 12 COUNTY OF SHIP OF THE BOY COUNTY OF THE BUILD HE SHIP HE SHIP HE and the a comment of the state of the second riserans or criou or in. . and don't a market in the o revent one Trun rentle of as, the bills to the reinforces ido, no red has account to finite of higher and and and . corroborated by him things, faibler, the first by the arease the control of the co an colf that the threw the our and am a set of the as to agree of the case out for all the age with men and all List and from the terms (personnel bring) using using -rel Bettata neke to th tent ; thank shi eshi es i the service clinear Service of thour ralgeons sew differ the theory that we welded have ever and the act cay it operated up to the erecales, ray and train pro-plant year area in the sales and a section and the section and the men year and an investor outliness that his live behind he was the law manufactured and deliberation of the obtain all the beautiful and business not said his being making the reg was brought him the quite to will represent patient chieff, old for white years not my has reported and by white

The engineer of the train testified that he saw the car approaching the crossing; that the bell was ringing and the whistle was being blown; that upon observing the fact the car did not stop, he had applied the energency brakes before he reached the crossing. He says that one of the front whoels of the car came in contact with the side of the engine. A number of witnesses testified for appellant that the whistle was sounded at a point north of the overhead crossing of the Michigan Central, and was continued to be sounded antil it reached the crossing. There is also evidence of the trainmen that the bell rings by an automatic device and was started ringing and the whistle blown at the whistling post north of the Michigan Central Crossing, and was so continued until after the accident. The jury found that the engineer was not negligent in failing to sound proper warning.

One of the young ladies who was riding with appellees at the time of the accident, states that she was riding in the back seat of the car with Robert Keltz, and that William, Jr., was in the front seat driving the car, with the other young lady at his side.

It is difficult to reconcile the physical facts existing in this case with the exercise of due care and caution on the part of appellees. They were in the operation of an automobile upon a road with which they were familiar; the automobile was brought to a full stop within eight feet of a railroad track, at a highway crossing out in the open country, away from the noise and confusion that prevails in and about switch yards and congested areas of the city; they looked both north and south along the track for approaching trains; the automobile

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was then put in gear and driven forward at about one mile per hour, to a point close enough to the west rail of the track to be struck by the engine. Accidents of this nature are indeed regrettable, but sympathy cannot be permitted to replace that degree of care with which every person is shargeable under the law, to observe for his own safety.

One approaching a railroad crossing, should do so with a degree of care commensurate with the known danger. This rule of law is so well established, that the citation of authority is unnecessary. It requires that persons approaching a railroad crossing, must make a reasonable use of their faculties in order to determine the existing conditions, and whether a train is approaching close enough to render their going upon the track dangerous. The application of this rule does not mean that the train must then be across the nighway, or immediately upon the highway. Neither will the application of the rule permit one to go recklessly upon the track without taking proper precaution to avoid accident, or to claim that he looked to see if a train was approaching and did not see it, when in fact the train was there, as it is apparent from the evidence in this case this train must have been.

The record has been carefully reviewed. The court does not find evidence going to establish negligence on the part of appellants with respect to the conditions surrounding the crossing in question which appelless claim caused them to be unable to see the approaching train.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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STATE OF ILLINOIS, SECOND DISTRICT	
SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the	State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a tr	ue copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and thirty
	Clerk of the Appellate Court

(73947)



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

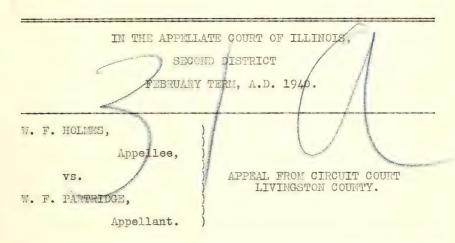
E. J. WELTER, Sheriff

305 I.A. 1622

BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

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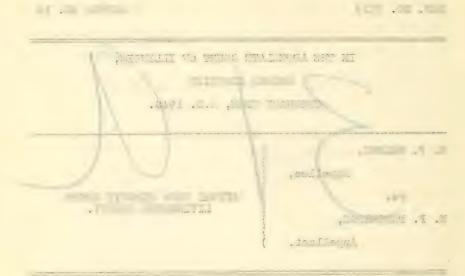
AGENDA NO. 12



HUFFMAN - J.

This case comes to this court on appeal from an order of the circuit court of Livingston County denying a motion to vacate a judgment entered by confession in said court. On March 30, 1938, appellee caused judgment by confession to be entered against appellant upon two notes, one of which was dated February 18, 1928, and the other dated February 21, 1928. These notes were signed by four makers, namely, Todd V. Richards, Charlotte E. Richards, J. D. Richards and appellant. At the time the judgment was taken against appellant, Todd V. Richards and J. D. Richards were dead. Appellant filed his motion to vacate the judgment against him on the ground that the warrant of attorney in the notes was joint only, and not joint and several, and that thereby judgment by confession against him could not be had.

The notes were given on a form used by the Farmers State Savings Bank of Cornell, Illinois, and are identical in form.



This case comes to this court on appeal from an order of neiton a gairned ytruck nother if i a frues timent out to .truce hise at networkered by confounted in seld court. March 70, 1996, aprollos causas judgment by confection to be entered apairos appallant upon two notes, one of which was dated lebraary 18, 1917, and the other dated Watenary MI, 1928. These notes were signed by four mekers, neaely, Told A chemis, Surgis I, Charles II, I deposit assets all appellant. At the tire the fair out was taken or it . Junileace Innllerda . Back eres miraretta .C .T bue afradell. .V flor, edt ne mid Janiese tremtsty edd steesv es meller aid to it Salot pay perce sas hi veguosse le smartar ed sads und joint and several, and that thereby judgeent . See ed toe blue ould set be bed.

The notes were civen on a form used by the Farners State .mot at Isothebi ere and are identical in form. The warrant of attorney therein contained, is as follows: "And in consideration of the above indebtedness and as further security for the same, I hereby irrevocably nominate, appoint and make any attorney at law in the State of Illinois or any other state or territory of the United States, my true and lawful attorney, to appear for me in any court of record in the State of Illinois or in any state or territory of the United States either in term time or in vacation, at any time after the date hereof, and to waive service of process, and to confess a judgment on this note in favor of the payee or any assignee thereof for such sum as shall at such time appear to be unpaid thereon, including attorney's fees as provided for above and herein authorized to be confessed, together with the costs of suit to be taxed: ***." No dispute exists with reference to the facts in this case and the only question to be determined is, whether the warrant of attorney is joint, or joint and several. A joint power of attorney does not authorize a judgment against only one of the makers.

A note containing power of attorney very similar to the above was before this court in the case of Duggan v. Kupitz, 301 Ill. App. 230, wherein the power of attorney was held to be joint. The position of this court in that case was supported by the authority there cited. The warrant of attorney under consideration herein, in substance and effect, is the same as the one appearing there; the difference being, that the warrant in this case is more extended in form. The power to confess a judgment must be clearly given and strictly pursued and a departure from the authority conferred will render a confession of judgment void. A warrant of attorney which is joint does not authorize a several judgment, but must be

The warrant of attorney therein contained, is as follows: "And in consideration of the three-bedieses and ar tracker security for the sawn, I hersey irrevosably abadaste, apocint was no about II to elet out al vel de voeroute une entre bas other state or territory of the United Other, or true und lawing attenday, to depen for the angle of the second in and to meetings so earth the at an eleminate out the white from the mainteen all to entit the mi meditie accord bedien after the dete moreof, and to welve sorries of process, . mi TO estype wit to revel as eser will to assemble a accinco of The say the dear the deal are are deal to the services any Lebivore as week a 'yearosta paisaient , noomed bicome ed for above and herein authorited to be confessed, tograher with dilu atalas eingeli oli "." Detai of of film le atace ent reference to the facts in this case and the only enestion to be determined is, whather the warmers of etterment is felut. or joint and saverel. A joint never of attoiner does not authorine a justions attends and the entropies.

A note centraling power of abterney very similar to the show was before this court in the case of beggen v. Supits.

301 Ill. App. 230, wherein the power of autorney was held to be joint. The position of this scart in that case was maplored ad by the antherity there elsel. The waternt of attency was defect, is the under consideration herein, in relationed and effect, is the same as the energies there; the difference being, that the warrant in this case is more extended in form. The power to confece a judgment must be clearly given and serietly pueres and and a departure from the sutherity confered will render faction of judgment void. A warrant of atterney which is

executed by a joint confession against all the signers of the note. Keen v. Bump, 286 Ill. 11, 14.

It is our conclusion that the warrant of attorney contained in the notes in this case is joint, and the joint obligation of the signers of the notes, and that the judgment against appellant by confession is void. The judgment herein is reversed and the cause remanded with directions to vacate the judgment by confession taken against appellant herein.

Reversed and remanded with directions.

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STATE OF ILLINOIS, SECOND PROPERTY.		
SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and	
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby		
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,		
of record in my office.		
	In Testimony Whereof, I hereunto set my hand and affix the seal of said	
	Appellate Court, at Ottawa, thisday of	
	in the year of our Lord one thousand nine	
	hundred and thirty	
	Clerk of the Appellate Court	



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

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IN THE APPRILATE COURT OF HAIMOIS,

STOCKS DICTRICAL

PHINDA I IDWA, A.D. 1940.

the entate of Dessie Darner, deceased, and work of the contraction,

upallaca,

TS.

NATE COLEY and Joseph OIL RE-IDEN BULLAND, a Company, (Johnson Cil Refining Company, a Corporation,

Appollant).

APPRAL INCOME COUNTY COURT

HUPPMAN - J.

Appelles administrator brought suit arminat fate John and the Johnson Oil Refining Company, a corporation, for the alleged wrongful death of Dessie Darner, resulting from a collision of an automobile in which she was riding, with a track comed and operated by Mate Colby. The defendant, Colby, filed a counterclain against appellee Edna Darner, who was driving the automobile in which the deseased was riding, and appellee administrator. Thereupon, Edna Jamer filed her counterclaim against Colby and appellant ecopany. Trial resulted in verdicts for appellees, whereby the administrator received wardlet in the sum of 14000, and counterclaiment Edna Darner, verdict in the sum of 175. Following the appeal motions, judgmenta were entered upon the verdicts. The expellent, Johnson Oil Refining Company, prosecutes this appeal from judgment rendered upon the verdicts as returned against it.

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with a confirmity of a constitution of a constitution of a constitution of a confirmity of a confirmation of a confirmat

It was charged by the appelloes that Calby was operating the motor truck involved in the collision, as the agent and servant of appellant. Appellant and Colby devied such allogation and averred that appellant was not the owner of the truck and that Colby was not the agent and servant of appellant, as charged; and alleged that appellant was not then engaged in the operation of the truck through Colby as its eyent or servent, and that it had no control over either Colby or the truck. Therefore, the disposition of this appellant was not appellant of the pool rests upon the recettor, whother Colby was acting as the agent and servent of appellant.

Appollant is a company engaged in the refining of crude oil, and in the distribution and sele of products common to such industry. In the conduct of its business, it mintains certain storage or bulk station plants about the country, where retail dealers are located who hamain its products. The purpose of this being to facilitate distribution to retail dealers. Tursuant to such plan, it maintained a bulk station plant at the city of Pecatonica, in Dupage county.

Colby was at the time in question, acting as the local name or for appellant, under written contract, which was entered into under date of January 10, 1936. By the terms of the contract, Calby egrees to devote his entire time to adicities sales of refined patroleum products for appellant, at prices to be established by appellant. The sales were to be sade in the name of appellant; the ware and see until sold, and the proceeds of much sales, at all times remained the property of appellant. July by the terms of the contract, acreed to provide,

ក្សី ។ ក្រុមប៉ុ - «៣ ១១ សែច » ២៤ ៤ ១០២០ ១៤ ប៉ុ - «២០ ១៤ ប៉ុ - » ១៤ ១៤ ខែ - «៤ ១០ ១៤ ១៤ ១៤ ១ maintain and operate at his own appears, such act a trustal as necessary to make proper sale and delivery of appellant's products; that he would pay all those on such equipment and license fees thereon, as required by law. Culby's demonstration was upon a samission basis, which was set out in detail in the contract, and depended entirely upon the amount of appellant's products he was able to sall. He could not make sales on credit, without the written authority of appellant. He was required to provided public liability and property damage insurance upon his motor equipment, at the contract damage insurance upon his contract was given to either party at any time.

The evidence conclusively show that the truck was evened by Colby. The contract is substantially the same as that which existed in the case of Joune v. Itanderfer, 200 II. up. 145, and under that case and the outhorities there referred to, it would appear that Colby was an independent contractor, under his agreement with appellant.

The record and authorities referred to in this case, have been carefully examined. hile it is true that Colby was encayed in the regular trade and business of appellant in soliciting sales of its products and in the delivery thereof, yet be did so entirely upon his own time and was no way in the central of appellant, except in the manner set out by the centract, and from this instrument it scald answer that the will of a pellant is dominant only as to the ultimate result to be obtained and not as to the means by which it was to be accomplished. May sutherities may be found bearing upon the question involved herein, but we consider those referred to in Jones v. I tenderfor, suprace, as Sufficiently comprehensive.

And the second s

Accesting appellant's nerobantise would be delivered to
the bulk plant by rail, and at other times by companies or persons sugared in the trusking business. At the time in question,
Colby and a san need Christian had been to appellant's plant
at thicego Reights, where they secured twelve barrels of all
and a quantity of grance and alcohol for meter vehicles. Colby
paid Christian for making the trip, and Christian did most of
the driving. At appellant's plant, when the bill of lading was
completed for the merchandise, appellant's plant superintendent
inquired of Colby to show the trusk belonged. Colby redied
that it belonged to Christian, and Christian signed the bill of
lading for the merchandise. Thus it appears appellant had no
knowledge of the fact that its merchandise was being transported to its bulk plant at Fecatonica by Colby's truck.

Appelless have filed their motion to present and introduce pertain evidence in this court to which the trial court mustained objections. The appelless have presented no cross appeal and assist no errors errors. Therefore, we do not deep it necessary to consider such notion in the disposition of this appeal.

The julgments herein against appallant are reversed.

Judgments reversed.

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STATE OF ILLINOIS, SECOND DISTRICT	TOTAL CONT. TOTAL CO. I. of the Annallete Court in and	
BEOOND DISTINGT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and	
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby		
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,		
of record in my office.	and of mid	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said	
	Appellate Court, at Ottawa, thisday of	
	in the year of our Lord one thousand nine	
	hundred and thirty	
	Clerk of the Appellate Court	

(73947)



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present --- The Hon. FRED G. WOLFE, Presiding Justice

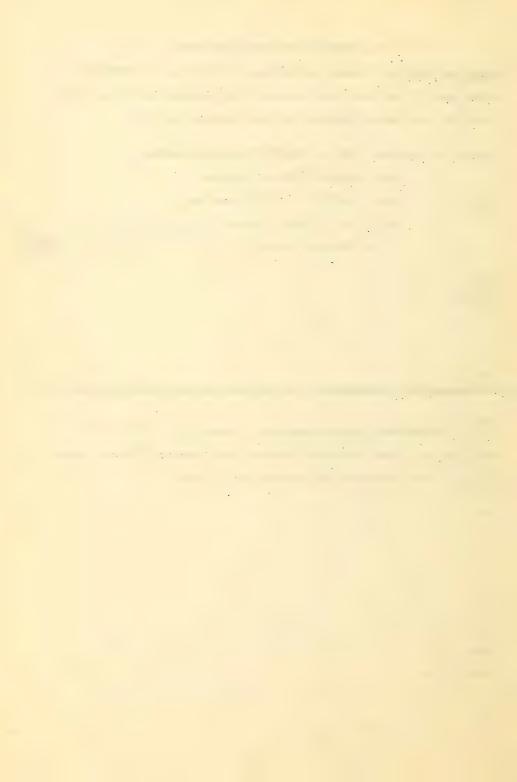
Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On And the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:



AGENDA NO. 21.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEDRUARY TERM, A. D. 1940.

SADIE YEATES, et al.,

Appellants,

VS.

SCHOOL DIRECTORS OF DISTRICT NO. 38, COUNTY OF KANKAKEE AND STATE OF ILLINOIS,

Appellees.

APPEAL FROM CIRCUIT COURT
KANKAKEE COUNTY.

HUFFMAN - J.

Appellants as taxpayers of appellee district, brought their complaint to restrain appellee directors from building an additional room to the school house in said district and making certain other new and additional improvements thereto. A temporary writ issued. Upon final hearing, the temporary injunction was dissolved and appellants complaint dismissed. This appeal follows.

Ward Mills, Richard Zimmerman and Cora Nichols were the directors of the district. The school building was an ordinary one room frame building, which had been kept in good repair and was designated as a standard school. On Saturday night, September 10, 1938, a special election was held for the purpose of submitting the question of whether of not a new schoolhouse should be built, and whether or not bonds of the district to the amount of \$5000, should be issued therefor. At the conclusion of the election, it was announced

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A polismic as inspayors of appolles liminist, brought their complaint to restrain appolles directors from building an additional room to the school beass in soil district and making certain other new and additional improvements thereto.

A temporary writ insued. Upon rinal bearing, the temporary injunction was discolved and appollants complaint disculseed.

and if its, itcherd directors and Core Michols were the directors of the district. The school building was an rathery one room frume building, which had been kept in as designated as a standard school. On this will be a standard school. On the correction of whether or not bonds wolftoness should be built, and whether or not bonds with the amount of 19000; should be issued.

that both propositions had carried, and on the next morning, which was Sunday, directors Mills and Timmerman employed certain persons to move the schoolhouse off its foundation. On September 14, 1938, the circuit court of Kankakee county issued a restraining order against the directors of the district, restraining them from proceeding with the construction of a new school building and from issuing any bonds therefor, by virtue of the special election. This restraining order is still in force. School has been held in the usual school building.

The complaint in this case was filed on August 9, 1939, to restrain the directors from erecting a new addition of one room to the schoolhouse and from making certain other new improvements thereto, according to a contract which they had entered into at a meeting held on July 17, 1939. Directors Mills and Zimmerman voted for such addition and improvements, and the making of contract therefor.

Director Nichols voted against the proposed addition and improvements to the schoolhouse. She had been a director of that district for thirty-five years. It appears that she voted against the erection of the additional room and the construction of the other proposed improvements, because of the fact that there were only two pupils attending the school, and that neither of them were a resident of the district. One of the students was a niece of director Mills, who had come from Momence to his home and had started to the school. She was about seven years old. During the third week of school, director Zimmerman brought a boy about thirteen years of age, to stay at his house, from another district. All of the children who live in the district are attending school at the city

thet both propositions had corried, and on the next morning, wrich was Sunday, directors Wills and Limportan evaloped cortain persons to sove the schoolheuse off the foundation. On September 14, 1938, the strought sourt of Hamkelees sounty issued a restraining order against the directors of the district; restraining them from propositing with the construction of a new school building and from issuing any bonds therefor, by virtue of the special election. This restraining enter is this restraining enter is still in force. School for been held in the reach school school still in force.

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Director Nichels voted against the proposed addition and improvements to the schoolhouse. She had been a director of that district for thirty-rive years. It appears that she voted against the erestion of the additional room and the construction of the other proposed improvements, because of the fact that there were only two pupils attending the school, and that neither of them were a resident of the district. One of the students was a nice of director Mills, who had come from Yomence to his home and had started to the school. She from Yomence to his home and had started to the school. She is that home, then the one that thirteen years of age, at his home, from another district. All of the child.

of Momence.

The testimony of director Zimmerman is to the effect that he has a boy living in his home who has been there about two weeks, and whose parents live in another district; that the boy is thirteen years old; helps on the farm, and attends this school. The testimony of director Mills is to the effect that he thinks the building needs the proposed addition and improvements; that the election for the new school was on Saturday night, and that he moved the building off the foundation at eight o'clock the next morning; that he did not know what arrangements the children in the district had for attending school at Momence; that he did not make any inquiry to find out; that he entered into the contract for the proposed work, not knowing if any children were going to school; that a little girl stays with him and goes to school; that her father lives in Momence; that he has no way of knowing if a family might move into the district with children of school age; and that he owns no land in the district. Cora Nichols testifies that the parents of the children are paying the tuition incident to their attending school in Momence.

It is the position of appellants that appellees, as directors of the school district, had no power to contract for the construction of an additional room to the schoolhouse, without a vote of the people, when such room was not needed for the accommodation of the pupils of the district. In support of this proposition, they refer to the case of Kuykendall v. Hughey, 224 Ill. App. 550. Such was the holding in that case. There is no claim made by appellees that the additional room proposed to be constructed is needed for the accommodation of the students at this school. As a matter of fact, it is apparent such position could not be maintained, as there is no dispute but that

.op. However.

The testing of director the order the testing of the be has a boy living in his hold had has been there shows the wooder, and whose carents live in amount district; the form is thirteen years old; being on the farm, and ablands till Jadi seells the death and control of the seels and . Looder -everyal has ach hibs hespony old three yabblind old salahds of ments; that the election Mys the dow select was on Cobarday is moitablenot old ito gmiblied and bevou on told bee thing thin won. In bid of that grainmen then off Hoole's Japla maternate to be a colutain out at neathles edd ainemegarum built of gricent was eight ton bin ad fait ; senomed to Locate . From becomeny ent uch fastimes ent ofth benefits and taif; two elitil a tadt (locase et gaiog stew norblide yar li galwond ton seril redays with him to ser of the tent her rather line in Comence; that he has no way of knowing it a faily might indi bas tens focules to methide driv. islavall odt otal even he owns no land in the district. Core Michels tentifies that the parents of the old then are paying the telline and to entered and the Challe State of the State o

It is the position of appellants that appelless, as directors of the school district, had he power to contract for the construction of an additional room was not needed for the accepta of the people, when such room was not needed for the acception, of the pupils of the district. In support of this proposition, when the holding in that case. There is no claim made by oppelless that the additional room proposed is no claim made by oppelless that the additional room proposed

only two students are attending the school and that neither of them come from homes within the district, but are apparently residing therein temporarily.

The affairs of school districts are intrusted to officers generally designated as directors. The legislature in the fullness of its power, has seen fit to so intrust the administration of the conduct of schools in general, to the discretion of the directors or Board of Education, as the case may be. However, this is so only as distinguished between the directors and the patrons of the district. The board of directors may not go beyond their legal power and authority, as they are only agents appointed by statute to carry out the system provided for. They have no powers except such as are conferred by legislative act, or such as may arise by necessary implication, and ordinarily, doubtful claims of power are resolved against them. It is true they have a wide discretion in matters intrusted to their care, yet they are but an administrative body, charged with the duty of administering the law with respect to the public school within their district. It is their duty to administer the affairs of the district as directed by statute and within the power and authority vested. Their personal differences cannot be permitted to injuriously affect the interest of the taxpayers of such district, and when the situation comes to that place, their conduct may properly be restrained by injunction at the instance of such taxpayers. From the record in this case, we find nothing tending to prove that the additional room is necessary for the accommodation of the students attending the school.

The judgment of the lower court is therefore reversed and the cause remanded.

Reversed and remanded.

only two students are alterdist the school sed that nothick of the scale from buses within its district, has are conservity residing therein temporarily.

arealito of secential are rivingely Louise to aright off generally designated as directors. The lagislature in the fallness of the power, but seen fit to so intract the adminismoids and the conditate of thing in goneral, he has also moids and of the directors or bound of iducation, as the case my be. However, this is so only as alchinguished between the directors and the patrons of the distinct. The board or directors may not go beyond their local newer and authority, as they are only agents appointed by tentore to carry out the system provided for. They have no no ere except such as are conferred by legislative act, or such as may arise by necessary invitestion, and ordinarily, domicial distant of power are received entires thom. of betagging another at motherests onto a over year eart at II begreed, who is vistataining as but ory the tody, oner their ear of deequer data well ent paircovainings to whom eds atter -be at with right of itsisted, along within foods allow bas chuiste yd besooth as toirtabb add le stielle add rotainin within the power and applierity vested. Their sevened differ-To Jesseval and seells "laudreigt of bestime" ad journe cooks the tampayers of such district, and whee the situation domes to that place, their condcet muy properly be restrained by injunction at the instance of such tampayers. From the resord in this oase, we find nothing tending to prove that the saditional room anibactin stanuate out to modificamenous out not grazzosen at

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STATE OF ILLINOIS, SECOND DISTRICT		
SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and	
for said Second District of the	State of Illinois, and the keeper of the Records and Seal thereof, do hereby	
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,		
of record in my office.		
	In Testimony Whereof, I hereunto set my hand and affix the seal of said	
	Appellate Court, at Ottawa, thisday of	
	in the year of our Lord one thousand nine	
	hundred and thirty	
	Clerk of the Appellate Court	



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

AGENDA NO. 6

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

FIBRUARY TERM, A.D. 1940.

WILLIAM LATTIN, as Administrator of the Estate of Howard Lattin, deceased,

Appellee,

VS.

APPEAL FROM CIRCUIT COURT LAKE COUNTY.

CITY OF ZION, a Municipal Corporation,

Appellant.

Per Curiam.

This was an action by appellee to recover for the wrongful death of his minor son Howard. Briefly stated, the facts out of which this case arose, are as follows: On Christmas eve, December 24, 1938, the deceased, Albert Anclam and John Tietz, spent most of the evening and night together visiting at various taverns. Somewhere near the hour of 4:00 o'clock on the morning of December 25th, they left a tavenn known as Scotty's Place, on a motorcycle owned and operated by Anclam. They were proceeding east on 21st street, which is an outlying street but within the corporate limits of appellant city. It appears to be a rather untrevelled street, without many people living in the vicinity of the place of the accident. When the boys left Scotty's Place, they mounted Anclam's motorcycle, with Anclam riding in front and controlling the operation of the machine. Tietz was riding

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Inignory slift mer measures of earlinging by notion in easy early of his miner sor downd. Friedly struct, the Tacks out tida esso arose, ere un follows: un Christaga eve, of 26, 1998, the docerest, 'Best Mindler and John Pists, apolity to grisisly rediged this best palmers and in term -- . Some fore near the boar or 4:00 stolock on the moraling The Birth they Left a terror known or Mootey's Place, on wie own and appreciate inclass. They were proceeding ent midilw the Jeonar pairfianc as at dollar , seess Toding a so of assence of . . whio inside or to addall and obroot, without war pours living in the vicinity provide a great rest control and the second of the second section in the could offer the parameter smaller below per operation of the usedine. Tiets was riding

directly behind Anclam and the deceased was riding directly behind Tietz. In this manner they proceeded east on 21st street to a place about six hundred feet east of the residence of Robert Cherry. Here, the city through W.P.A. work, had been engaged in filling in a low place on 21st street. This fill was about two hundred sixty feet in length. It was higher than the old roadbed at both the west and east ends of the fill. It consisted of dirt which had been taken from the sides of the road, and which at the time in question was frozen and very rough. It appears that only one travelled track existed across this fill. There were two flares at the west end of the fill and two flares at the east end. Only one of the flares was burning at the time, which was at the west end of the fill and to the south side of the road. When Anclam approached this fill from the west, he states that he did not see it nor the flare, until too late to avoid the accident. When the motorcycle hit the fill, it threw Anclam and Tietz clear of the machine, and they apparently sustained no injuries of any consequence. The deceased evidently became fastened to the machine, and sustained injuries from which he died. The evidence shows that after the motorcycle hit the fill, it proceeded east for a distance of about two hundred forty eight feet, where it came to a stop at the side of the road and in an upright position.

The trial resulted in a verdict in Yavor of appelles in the sum of \$2000, and appellant brings this appeal from judgment rendered thereon.

It is the position of appellant that the deceased was guilty of contributory negligence and this is considered to be the controlling factor in the case.

(Deposit Section and Research half has belief Schief allowed). dell mo sale beloacet they proceeded easy on list angulium ent le tace teel beakhud ale tucde coefy t of Hobert Chemy, nore, the city street in M.P. .. week, had been engaged in Filling in a low place on Alas while . This Then id was II . As not in Jost 13: is beginned out smode now Illia and to all a wire how year and all there to headhout the and . It considers that we do not be to be to be to the team has been the market of the first the self-te on the self-te one lede at the and fell mean each also the trent of the adjust to the fill filt. There were to clares at the water arm been all he are the last seal and he had been all the last the lift and All and the first one of the particular path will be malesed also a the annot side of the mond. When we are connectable tile on you the rest, he states that he ald not see it nor the ere, until too late to avaid the acaider . . 'er the moundaile . I the thill, it terror against the calles of the machine, they apparently sustained as injuries of the states come. Our periods of the format fractions to the religious fractions indu ancela corebive enf . boil of doils not's calculat boni a tol from believery if gills and the elegerates off anta fi meetiv jeet ingto togto eigh feet, wheen it were to set the side of the mond and in an application. The Wilderson Louise Control of Parties of September 1 of the Parties of September 2 of Septembe take your Command or the state of the command to the state of the PERSONAL PROPERTY AND PERSONS ASSESSED.

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Anclam and Tietz both testified that they did not see the flare before striking the fill. There is nothing to indicate what the deceased saw, or what he might have said to the other two boys. Their testimony is silent on that point. It appears that the Cherry residence is at the top of a slight hill and about six hundred feet west of the west end of the fill. From the Charry residence to the fill, is downhill. After the accident, Tistz walked back to the Cherry residence to secure help. This was shortly after four o'clock on Christmas morning. Cherry went with Tietz to the scene of the accident. He testified as a witness on behalf of appellee. He states that as he left his house, he could see the flare burning at the west end of the fill. He found the motorcycle within about fifty feet of the east end of the fill. Fietz testifies that when he started back with Cherry to the scene of the accident, he saw the flare burning. Cherry returned to his residence and reported the accident to the police department and called for an ambulance. Officer Simpson reported in a police car. The deceased was sent to the hospital. Cherry returned to the scene of the accident and then went to the police station. At the police station, Anclam and Tietz were questioned by various of the officers then on duty. Their statements regarding the accident were rather vague. In effect, they merely stated that they did not see the fill until they were upon it and did not see the flare, and that when they hit the fill they were thrown from the machine and did not remember anything thereafter until they came to at the side of the road. Anclam stated that he was going forty-five miles an hour. Tietz did not know now fast they were going, but thought it was faster. The evidence is in dispute as to the state of sobriety

and in this gold that follities dood rich has subject the filer before starting the fill. There is nothing to indicate that deceased any or what are mind into soil to the other the bors. Cheir westing of a silent on that point. the life is the gost off the all periodices through all smit through the aif to kee door out in sports of Larbard tin food but 1757 . If identify it is a constituent representation of the constituent repres After the accisose, then realized had to the Ocean residence -defined the field of the transfer after the colors and the field of -og oil to amera will it mosil with onon your Children and . believe to hirded no saenthy and helitosa et .sue to on that as he left his house. It could see in that's bound and the wast and of the that he concept to the colored the chi -liers of the . Ail's eld to how many one to such weil's owner wi off to smear and or verself dirty should here and make the seems of and on hearth to see the country. Charge petition to his durationed cohiar the of dualities and identifies department of the tor in arbelens. Utilize Timbouted in a natice car. The descapations and to the homeital. Charmy rasilve eas east of the searchant and the teas east of terms - At the moldes spation. Amelian and sit there canadiana attempt the orliners that or dufy. That statements real coefficient course receive your realizers had bellbringer STATE STATE THE PARTY AND AND PARTY OF PERSONS PARTY PA all July ball bade July her coally all use her all are JU mage reducing For All the original our night word were not 1919. the till it said to all the or man hard lime taffareast militers. the best of the party of the party that have been been as the are to discourt for Landso saw sact root one over the tip arely trained because of an extensive or street, and an extensive out a contract

of Anclam and Tietz. Anclam stated his age to be 18. Tietz stated his age to be 18. The deceased was 16.

Officer Simpson who answered the call placed by Cherry, testified that he saw the flare at the west end of the fill when he was about four blocks west thereof. Anclam, Tietz and Cherry were there waiting for him. He found the deceased lying at the side of the road. Officer Ruesch went to the scene of the accident. He states that when approaching the fill from the west, he saw the flare container at about five hundred fifty feet distance. Appellant's witness Wilson, accompanied officer Simpson and states that he saw the flare burning as they approached the fill from the west, and that in his opinion, they first saw it at a distance of from three to four blocks west of the fill.

The road at the place in question was not closed to traffic. W.P.A. labor had been engaged ffon time to time during the winter, filling in this low place by throwing dirt from the sides of the road into the travelled portion thereof. The testimony is that the travel on this road is rather infrequent. The witness Cherry, who appreently lived the nearest to the fill, states that he had been using it in driving to and from his home and his work. He says that the ground was frozen and rough and that over this fill there was but one travelled track. Each end of the fill was somewhat higher than the surface of the old road, and therefore caused a raise or bump. Anclam states that he had the headlight of his motorcycle turned on and could see two hundred feet down the road from the use of the headlight. He further states that he applied the brakes of the motorcycle about seventyfive feet before he reached the west end of the fill, but that

Differ diagnos who was valed the sail sinusi to the thirty setting as this diagnos and the rear and the rear and the setting setting the sail that the rear and the setting the was about from blooms that the rear. The found is a saturdade and Cherry were the rear that the found is a saturdade at the rear the first these the said that the setting the first these that the rear the rear that the rear the rear that the rear the rear that the first the saturdade at the the thirty fort discussion. I pallent's all must be and the the saturdade at the the thirty fort discussion in the head that he are the the thirty and they approached the first field from the order of the the thir said oplains, they depressed that the the same when it is a same blooms the first the first the first the same when it is a same blooms the first the fill.

The road to the place in a stient out to discout for LALL AS MIN' for the language of the took in the strangt during the while to the party of the place of the said modifiery bailty one with rand from only to every said north drie thereof. The testing to test if there is will no it in ment alternate of record stands off , married and mi of paint to the time and the best and the state of the or sent till our sentent by the part to part on these Loare che surface of the ele rock, or coeffice ede and To distillated the best of and the state of and the call of The treat for the second only one of the second stays respectively and the best and the secretary - gind ved doods slogunadom odd to sogord edu lell THE RESERVE OF THE PROPERTY OF THE PARTY OF THE PARTY OF THE PARTY. he does not remember anything after he hit the fill. The evidence is not in dispute that the machine proceeded almost across the fill before it left the road and stopped in the ditch at the side thereof. The motorcycle had a third wheel attachment, which apparently kept it in an upright position.

The deceased had been in the company of Anclem and

Tietz most of the night, and had ample opportunity to acquaint
himself with all the surrounding circumstances, and to determine whether he desired to ride as a third passenger on this
motorcycle. The accident was indeed a regrettable one.

This court is of the opinion that the verdict is not supported by the evidence.

Judgment is therefore reversed and the cause remanded.

Reversed and remanded.

be does not remember engining efter he hit the fill. The wittened is not in dispets thet the meeths presented almost screen he fill before it left the red and atopped in the fitth at the side thereof. The motoreyele had a lifter wheel attachment, which apprecably impt it in an upright position.

The deceased and been in the company of smalle and read at the constant of societate in the constant bisself. The constances, and to deberate and the surroundir; singularized, and to deberate and the constant of the consta

This scart is of the opinion that the variet is not

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consent has become

STATE OF ILLINOIS, SECOND DISTRICT	
SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the	State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a tr	ue copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and thirty
	Clerk of the Appellate Court

(73947)



41095

MARY B. SEVIER, Administratrix of the Estate of Albert E. Sevier. Deceased,

Appellmet,

V.

CHARLES P. MEGAN, Trustee of the Chicago and North Western Railway Company, a corporation,

Appellee.

APACAL PRODUCTION OF SULARTOR COURT OF GOOR COUNTY GRANTING A NEW TRIAL.

305 I.A. 165

MN. JUSTICE O'GONNOR DELIVERED THE OPINION OF FAC HOURT.

Plaintiff brought suit against defendant under the provisions of the Federal Employers' Liability act to recover for the death of her husband. There was a jury trial and a verdict and judgment in plaintiff's favor for 15,000. A new trial was awarded and this court granted leave to appeal.

The record discloses that albert ". Sevier was employed by defendant as a brakeman and between 9 and 10 o'clock on the night of May 21, 1937, the southbound freight train consisting of 36 cars, on which Sevier was employed as head brakeman, stalled while going up a rather steep hill about 2 miles north of Buds, Illinois. Sevier got off the engine where he was riding on the firemen's or east side of the train shortly before the train stalled, walked back to see what was wrong and after the train stopped declded to cut it between the 36th and 37th cars.

The evidence tends to show he closed the angle cooks on the 2 cars, uncoupled the air hose, then crossed over to the suginser's or west side of the train, signalled the engineer to back up so he could pull the pin and thus cut the train at that point. The engineer backed up, as he testified, from 20 to 60 feet when the front section of the train ran into the rear section. The engineer further testified that from the time he received the signal he did not again see the signal lantern which Mevier had. The train crew consisting of the engineer, fireman, conductor and the rear brakeman, went along the

THE SALE

MARY S. SEVIEW, Administrating of the Vetate of Albert E. Sepler, Deceased,

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OBSTRACT CHURCH SUDD

305 LA. 165

BR. JUSTION O'CORNOR DILLIVIATE THE OFINION OF YOU COURT.

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The evidence tends to show he closed the angle dacks on the 2 cars, uncoupled the air hose, then crossed over to the engineer's or west side of the train, signalled the engineer to back up so be could pull the pin and thus cut the train at that point. The engineer backed up, as he testified, from 90 to 60 feet then the front section of the train rem into the rear section. The engineer further testified that from the time he received the signal he did not again see the iteal lantern which Sevier had. The train crew consisting of the

. Hours, fireman, condinctor and the many brackeness mant alance the

train to ascertain what had happened and found that levier was crushed and held between the bumpers of the 35th and 37th care. He was instantly killed. Shortly afterward the front section of the train was taken south over the hill to a switch track where it was placed; the engine was then brought back and the second section was likewise taken south over the hill, and after the two sections were connected, the train proceeded.

The evidence further shows that when the angle cocks were closed, the air brakes with which the train was equipped, were out of use on the rear section but the engineer had control of the forward section; that after the air hose is uncoupled between the two cars and the angle cocks opened, this would set the brakes.

The testimony of the conductor and the rear brakeman is to the effect that after the train stalled and apparently after the cut was made, the rear section started back north or down the hill and then rather suddenly came to a stop as though the brakes were set.

At the close of all the evidence defendant moved for a directed verdict, which motion the court reserved. Thereupon the verdict was returned april 14, 1939, in plaintiff's favor. April 19, before judgment was entered, defendant filed a written motion for judgment notwithstanding the verdict. July 11, the court denied the motion and entered judgment on the verdict in plaintiff's favor for als,000. Three days later, defendant filed a written motion for a new trial specifying a number of grounds. November 2, the motion was allowed and a new trial awarded. Counsel say the trial judge rendered no opinion and gave no reasons for awarding the new trial.

It is the theory of defendant that levier met his death solely on account of his own negligence that after he closed the angle cooks on the two cars and uncoupled the air hose he neglected to open the angle cock on the rear section of the train before makin, the cut; that after he pulled the pin to make the cut (there being no brakes on the rear section of the train), it started down hill and

train to accertain what had happened and found that levier was cruehed and held between the bumpers of the Seth and 37th care. He was instantly killed. Ebortly afterward the front months of the train was taken of the hill to a sudden track where it was placed; the engine was then brought back and the second sertion was likewise taken south over the hill, end after the two sections sure connected,

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It is the theory of defendant that Sevier met his death not to the course and uncoupled the air home he neglected to open the angle cook on the rear section of the train before making the cut; that after he pulled the pin to make the cut (there being no the rear section of the train), it started down hill and

when Sevier saw this he hurried in between the two care to open the angle cook on the south end of the south car of the north section of the train and thus set the brakes; that while he was in the act of doing this the engineer continued to back the other section of the train and when Sevier opened the angle cock, the north section stopped and he was crushed and killed.

On the other side, the position of counsel for plaintiff is "that there was substantial evidence for the jury, first, as to whether the engineer was negligent in the manner in which he backed the train *** without any warning or acknowledging signal for as much as 60 feet without any application of the automatic brakes *** so that a coupling pin could be lifted not more than 36 cars back " - that the engineer continued backing "after he saw the light which he said he saw, and assumed was Sevier's lantern, disappear from view." That the evidence shows the angle cook on the rear and of the 35th car was closed so that the engineer had complete control of the 36 cars and that he could have stopped the 36 cars in 1-1/1 seconds.

Counsel for plaintiff say that the trial judge, in awarding the new trial, adopted defendant's position holding "that as a matter of law no recovery could be had upon any view that could be taken of the evidence." We cannot concur in this statement in view of the fact that the trial judge rendered no opinion when he awarded the new trial because such action would be directly contrary to the order theretofore entered by him in overruling defendant's motion for judgment notwithstanding the verdict.

Plaintiff's position is that there were no procedural errors; that the question of liability was properly submitted to the jury who returned a verdict in plaintiff's favor, and that this court should reverse the order awarding the new trial and enter judgment on the verdict.

The controlling question in this case is whether the engineer was guilty of negligence which, in whole or in part, brought when Sevier can this he humied in between the two care to epen the angle cook on the south end of the couth car of the north section of the train and thus sot the brains; that while he was in the act of doing this the engianer convinued to back the other section of the train and then levier opened the angle quely, the north estion stopped and he was crucied and silled.

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The controlling question in this case in whether the on-

about levier's fatal injuries. So far as the evidence discloses. there were no defects in any mechanism of the train. At plaintiff's request, the jury were instructed that if they believed from a prepanderance of the evidence, defendant was negligent and that Sevier was killed as a result "in whole or in part from such negligence" then they should find for plaintiff. And in other instructions submitted by plaintiff, the jury were told that if they believed from a preponderance of the evidence that the engineer, in the exercise of ordinary care, for the safety of the deceased, could have prevented the accident, their verdict should be for plaintiff. In instructions tendered by defendant, the jury were told that plaintiff alleged the train was equipped with defective air brakes yet there was no evidence to support this allegation and the jury should not consider that question in arriving at their verdict. That the plaintiff could not recover if they found from a preponderance of the evidence that the sole cause of Sevier's death was occasioned by his own act. We think these instructions properly presented the vital question to the jury.

Defendant contends that the court erred in refusing to give three instructions requested by it. By one of these instructions it was sought to tell the jury there was no evidence legally tending to prove that after the train stalled it "parted" or "broke in two" and that they "must not consider anything that has been said during the trial of the case on that subject in considering or arriving at your verdict. In other words 'the train parted' matter, contention or subject is out of the case and you will give it no consideration whatever." We think this instruction was properly refused. There is considerable argument in the briefs as to whether the signal given by Sevier to the engineer was a "back-up" signal described as a "circle at arm's length" which signal plaintiff contends under one of defendant's rules which was in evidence, was that the train had parted and was not a signal to back-up. There was no evidence that the "train parted" but that it was "cut" by Sevier in uncoupling it be-

short bevier a fatal lajurios. So for an the svidence disclosen, there were no defects in any mechanica of the train. it plaintiff's request, the jury were instructed that if they believed from a gelvet fait has the granes defendence was nearly on the superconsucre and because from more star at to slow at the sease as beilin and they cheek find for plaintiff. Ind in other instructions submitted by plaintiff, the jury were told that if they believed from a seenonderance of the evidence that the explaner, is the excreise of ardinary sare. For the safety of the decembed, could have prevented the accident, their vertica coucil be for plaintley. In testropellane resident by defendant, the jusy were built that whether the things the train was equipped with defective air brakes yet there was no evidence tady rabicons ton blooms your and the consider that tropper of density at their verdict. That the pleister of the fact sensblys and to somethnosers a most basel took ti toycoor sole cause of Sevier's doath was accessioned by his own act. those inclustions properly presented the vital question to the jury.

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tween the 56th and 37th care. .e think the instruction dight also tend to confuse.

The next instruction which defendant contends was improperly refused, sought to have the jury "instructed that as a metter of law the failure of the engineer to respond, by blowing his whistle, to the back-up signal referred to in the testimony of the engineer, was not and could not be a proximate cause of sevier's injury and death and therefore the jury were not authorized to base their verdict in favor of plaintiff upon the claimed failure of the engineer to whistle after getting the back-up signal. We think this instruction was properly refused. The question was for the jury to decide whether evier had given the engineer a back-up signal and whether the engineer's failure to respond by blowing his whistle caused, in part at least, the fatal accident. The instruction would climinate the evidence tending to show the engineer did not see any signal.

By the third refused instruction, defendant sought to have the jury told that even though they found defendant was negligent, yet if they also found levier was negligent and that except for his negligence he would not have been killed, their verdict should be for defendant. The jury were told in other instructions that plaintiff could not recover if they found that levier was killed solely as a result of his own negligence. This was sufficient.

There was evidence to the effect that no signed was given to the engineer to back up because Sevier was not in a position where he could give such signal on account of the curve in the track, trees and other obstructions.

There is considerable discussion in the briefs as to whether certain rules of the railroad company were applicable to the facts in the case and therefore admissible in evidence. We think it would serve no purpose to discuss these contentions in detail since we have reached the conclusion that we would not be warranted in distrubing the order of the court awarding a new trial. On a retrial of the case we think counsel would have no trouble in view of the facts disclosed by

tween the 38th and 37th corp. . a think the instruction sight slee tank

The next instruction which defendent contends was increasing the course, sought to have the "instructed that was matter of law the failure of the engineer to respond, by blowing his writtle, to the back-up signal referred to in the testimony of the engineer, was not and could not be a president example of tevier's injury and feath and therefore the jusy were not enthanked to best injury and feath of plaintiff upon the claimed failure of the engineer to mistle after noting the back-up signal. He think this instruction was grouperly refused. The question was for the jury to decide enthancer's tailure to respond by blowing his which is suched whether the angineer's tailure to respond by blowing his which a caused, in part at least, the fatal saction. The instruction would eliminate the evidence tending to

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the evidence, in offering any rules which are not applicable.

Whether the engineer was guilty of any negligence in backing the train from 20 to 60 feet, as the engineer testifies, in response to Sevier's signal so as to permit sevier to cut the train, or whether to create the necessary slack it was only necessary to buck the train a few feet, we do not pass upon. But in view of the estire record we are of opinion we would not be warranted in holding the trial judge clearly abused the discretion which the law reposed in him in awarding a new trial. Wagner v. Chicago Motor Coach Co., 200 Ill. App. 402;

Tone v. Halsey, Stuart & Co., 200 Ill. App. 169; Couch v. 50. Ry. Co., 204 Ill. App. 490.

The order of the Superior court of Cook county awarding a new trial is affirmed.

ORDER AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

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the evidence, in effecting any releasing or as applicable

the train from 20 to 60 fort, as the engineer resulfied, in response to the train from 20 to 60 fort, as the engineer resulfied, in response to Sevier's eignel so as to permit fevier to cut the train, or whether to dreate the necessary slack it was only necessary to beak the train for few feet, as do not pare upon. But in view of the entire recess we are of opinion we would not be surrented in view of the entire recess we clearly abased the discretion which the law reposed in him in swarding a new trial. Success to discretion which the law reposed in him in swarding a new trial. Success to discretic feet, and its in 100; fouch v. So. Ex. Co., 200 III. App. 400.

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Stuart E. Pierson, Administrator de bonis non with

Will Annexed of the Estate of David Meade

Fishback, deceased, Plaintiff Appel-

lant v. Louise Fishback, et

al., Defendants Appellees.

Gen. No. 9219.

305 I.A. 165

Mr. Presiding Justice Riess delivered the opinion of the Court.

The above cause comes to this Court upon a second appeal, from a decree of the County Court of Greene

County, Illinois.

The original petition filed by Stuart E. Pierson, Administrator de bonis non with Will annexed of the Estate of David Meade Fishback, deceased, prayed for an order of court to sell all real estate of which said deceased died seized and possessed except certain homestead premises then occupied by Louise Fishback, widow of said deceased, for the purpose of paying debts and claims allowed or chargeable against said estate. A decree for sale of the real estate was entered, from which an appeal was taken to this Court, wherein the cause was duly heard and the decree of the lower court was reversed and set aside and the cause remanded to the County Court "for such other and further proceedings as to law and justice shall appertain". No specific directions were given in that opinion concerning the form of order to be entered by the lower court. The case is reported in abstract form as Pierson v. Fishback, 299 III. App. 627, 20 N. E. (2d) 329, in which opinion a full statement of the facts and issues arising in the former trial are set forth and need not be repeated in this opinion.

Upon filing the mandate of this Court in the court below, the plaintiff petitioner prayed leave to file an amended and supplemental petition for the purpose of retrying said cause. Upon the former appeal, it was held under the facts then in the record that petitioner's right to sell the premises would be barred by laches. The amended claim contains certain additional allegations seeking to justify the lapse of time before filing the petition and to make proof of additional facts



thereunder, and the supplemental petition set forth the conveyance of the premises sought to be sold in said proceeding by said Louise Fishback to David Donald Fishback, son of said deceased, and Jack McDonald and Gilbert K. Hutchens, including in addition to a 310 acre farm, a homestead property consisting of certain lots and dwelling house in the City of Carrollton, Illinois, which conveyances contained release and waiver of all homestead rights of Louise Fishback in the latter premises.

The Trial Court denied the appellant's motion for leave to file an amended and supplemental petition for sale of all the real estate except said homestead premises and found that the prayer of the petitioner should be denied as to sale of all real estate other than said homestead as being barred by laches; the entry of which orders were assigned as error by appellant

herein.

In our former opinion reversing and remanding the cause, we held in substance that under the facts set forth in the record, the appellant should have been permitted to refile her claim against the estate, to assert her rights to rents and profits, and upon allowance of her claim, be permitted to prorate with other sixth class creditors.

The lower court erred in denying the appellant's right to file an amended and supplemental claim alleging additional facts and joining the grantees named in the deeds and creditors as additional defendants, to be

followed by a rehearing upon the merits.

The cause is therefore reversed and remanded with directions to the Trial Court to set aside its decree of August 4, 1939, and to permit the filing by the appellant of an amended and supplemental complaint and joining additional parties.

Reversed and Remanded with Directions.

(A-19598—14)



tract

Lottie Biehl, et al., Plaintiff-Appellees, v. The H. N. Schuyler State Bank of Pana, Illinois, (Defendant-Appellees), First Presbyterian Church of Pana, Illinois, Louisa Clarke, Amelia Granda, et al., Defendant-Appellants. Oscar Nelson, Auditor of Public Accounts, Ex Rel., Plaintiff-Appellees, v. The H. N. Schuyler State Bank of Pana, Illinois, Defendant-Appellees, Intervening Petition of Louisa Clarke, Amelia Granda and The First Presbyterian Church of Pana,

Illinois, Plaintiff-Appellants. 3 0 5 I.A. 166

Mr. Justice Fulton delivered the opinion of the Court.

This is an appeal from two decrees rendered by the Circuit Court of Christian County in two cases which were consolidated by stipulation for the purposes of this appeal, and by agreement of the parties, tried and submitted on one record.

The H. N. Schuyler State Bank of Pana, Illinois, closed its doors on February 6, 1930. A suit was filed in the Circuit Court of Christian County by the State Auditor of Public Accounts for the purpose of liquidating the affairs of the bank, and on April 21, 1930, one A. W. Frankenfeld was appointed Receiver. This cause bore the general number 11178. On May 13, 1930, the Plaintiff-Appellees, being depositors and creditors of the bank, filed a representative stockholders liability suit, seeking to recover assessments on the bank stock of said institution. This suit was numbered 11180.

The controversies in the case arise over the administration of a trust and the handling of the estate of one Kate A. Comstock. She was the owner of 80 shares of stock in The H. N. Schuyler State Bank from 1907 up until the date of her death in 1923. The Bank was engaged in the general banking business but was not



authorized to take and execute trusts. On January 23, 1922, Mrs. Comstock made and executed a Trust Agreement concerning all of her property, wherein and whereby, she appointed the said Bank as Trustee to handle and dispose of her entire estate. In the first clause of the instrument she instructed the Trustee to convert the 80 shares of bank stock into money to be added to her cash balance on deposit in said bank, to be used in the payment of her debts and a large number of bequests, aggregating over twenty thousand dollars. The trust instrument directed that many of said bequests be paid within one year after her decease. Others were to be paid in payments running from five to twenty years and others when children became of age.

To the Appellant, The First Presbyterian Church of Pana, Illinois, was bequeathed the sum of \$5,000.00, to be held by the Trustee for a period of twenty years, and only the income paid to the church annually during that time. After the expiration of the twenty year period the principal was to be paid to the church as needed. To the Appellants, Louisa Clarke and Amelia Granda, was given the sum of \$2,000.00 each to be paid in installments during a five year period after the

death of Mrs. Comstock.

At the death of Mrs. Comstock all of her property was in the hands of the bank. Subsequent to the date of her death, the expenses of her last illness were paid and during the year 1925, a number of the gifts or bequests mentioned in the Trust Agreement were paid by the Bank. The Bank stock was never converted into cash and in March, 1926, it was transferred to the four residuary beneficiaries in kind, each taking 20 shares.

At date of death the checking account for Mrs. Comstock amounted to \$3,000.00. The account was carried on after her death, and the business of the Estate handled by the Bank. When the Bank closed, the Receiver took possession of the trust property.

In April, 1933, A. W. Frankenfeld resigned as Receiver of the Bank and Nora Molz was appointed Suc-

cessor Receiver.

In the Stockholders liability suit, the Appellants were not made parties in the original complaint, but in September 1934, the Appellees filed an amendment to the complaint making the Appellants and Nora Molz, as Receiver of The H. N. Schuyler State Bank, additional parties defendant for the purpose of recovering the liability on stock owned by Kate A. Com-



stock during her lifetime and afterwards until said stock was transferred on the records of the bank on March 29, 1926. By the Amendment, the Appellees claimed a first lien on all of the assets of the said Kate A. Comstock coming into the hands of the bank. It further asked that all of said assets of the trust be applied on the liability due to the Creditors of said bank and in case of a deficiency after the application of said assets that the Appellees recover from Appellants to the extent that each had received assets from said trust.

The same complaint was amended on several other occasions, the last one being filed on March 14, 1938, In April, 1935, the Appellants filed an answer to the complaint as then amended. The answer alleged that the Bank wrongfully accepted the trust and that Nora Molz, as Receiver, took possession of the trust property without qualifying as Trustee. It also averred that Nora Molz was not authorized to take or administer said trust: that the cause of action did not accrue to the Appellees at any time within five years before the commencement of the suit, and that said Trustee wrongfully took and converted the trust funds. On July 27, 1936, the Appellants, by leave of Court, filed a cross-complaint charging the same matters set forth in their answer. On July 27, 1936, the Appellants filed a petition in the liquidation suit asking for the removal of the said bank and Nora Molz, Receiver as Trustees of the said Trust Estate. The petition charged that the Receiver had been cooperating with the Creditors of the Bank to dissipate the trust funds which the said Nora Molz was holding for the benefit of the petitioners.

In May, 1935, Nora Molz, Receiver, answered the amended complaint in the Stock liability suit, and later an amended answer admitting the acceptance of the trust by the bank, setting forth certain acts of the said bank as said trustee, and admitting that she had in her hands, as Receiver of said Bank, the sum of

\$7,425.00, belonging to said Trust.

Voluminous motions and amendments were filed during the progress of the suits but the original complaints, as amended, the cross-complaint and the intervening petition were all answered and the case at issue at the time of the hearing before the Court.

The proofs, in addition to those already stated and those disclosed by the pleadings, show that after the death of Mrs. Comstock in 1923, her account was car+ 1

ried on by the bank until the time of closing its doors in 1930, and thereafter by the Receiver to the year 1935. Beginning with July 1, 1925, \$75.00 had been paid the Appellant, First Presbyterian Chuch of Pana, Illinois, by the bank semi-annually until November 23, 1928, when there was paid the church \$150.00, and the same amount again paid to the Church on December 28, 1929.

After the bank was closed by the Auditor, the Appellants filed general claims in the liquidation suit against the bank based on the said trust agreement. which claims were allowed in the amount of \$5,000.00 to the Church and \$2,000,00 to Amelia Granda and Louisa Clarke respectively. Afterwards on April 1. 1931, the Receiver paid a general dividend of 121/2%. and paid to the First Presbyterian Church \$625.00 as a dividend on its claim. He also paid the Appellants Amelia Granda \$250.00 and Louisa Clarke \$250.00. On January 15, 1934, a second dividend of 5% was paid to all general creditors and at that time there was paid to the Church \$250,00. Amelia Granda \$100,00 and Louisa Clarke \$100.00. A little later, the Trustees of the First Presbyterian Church filed a petition in suit No. 11178, asking that their claim against said bank be reconsidered and re-allowed as a preferred claim, and on May 21, 1934, a decree was entered in said cause allowing the claim of the Church in the sum of \$4.125.00, being the amount of \$5,000.00, less the dividend payments of \$875.00, as entitled to a preference. In the same manner in July 1935, the claims of Amelia Granda and Louisa Clarke were allowed as preferred claims in the amount of \$1,650.00 each. being the sum of \$2,000.00 in each case, less the dividend payments of \$350.00, to each claimant. The basis of the claims for preference was that the bank had previously acted during its period of solvency as a Trustee ex maleficio of the Comstock Trust. Immediately thereafter, Nora Molz, as Receiver of the bank, set up as a reserve the sum of \$7,425.00, being the aggregate of the said three preferred claims.

In cause No. 11178, being the liquidation suit, the Court dismissed the intervening petition of Appellants on the ground that as claimants the petitioners had previously gone into the Circuit Court and had, at a former term of Court, their claims determined to be preferred and judgment or decree taken accordingly. That as to any relief prayed, the intervenors had been

guilty of laches.



In cause 11180, being the stockholders liability suit, the Court found that the Appellees recover the sum of \$8,000.00 from the trust estate in manner, to-wit: That all monies in the hands of Nora Molz, as Receiver of The H. N. Schuyler State Bank, which were identifiable as coming from the Estate or Trust fund of the late Kate A. Comstock, including all monies held by said bank at the time of its closing, and against which the preferred claims of Appellants were allowed and impressed, should to the amount of \$8,000.00, be paid over by said Receiver, in due course of administration to the Receiver appointed in this cause.

That the claim of the Appellees should be satisfied first, and prior to the claims of the Appellants under their preferred claims, and that any interest the said Appellants might have to any funds in the hands of said Receiver, accruing from the Comstock Estate or Comstock Trust be subservient to the claim of said

creditors.

That Appellees were not entitled to recover from the Appellants any sums heretofore paid to them by the Bank or its Receiver.

Decrees were entered in each case in accordance with the findings of the Court. Appellants have prosecuted an appeal to this Court seeking to reverse the judgments of the Circuit Court as set forth in said decrees. The Appellees have filed a cross-appeal in suit 11180, alleging that the Court erred in holding that Appellees, as complainants in said cause, were not entitled to recover from the Appellants, First Presbyterian Church, Louisa Clarke and Amelia Granda, the respective sums of money paid them by the said bank or the Receivers thereof, prior to making them parties Defendant in said suit.

It is first contended by Appellants that the Trustee should be required to pay the entire assessment against the stock held by Kate A. Comstock because of the mismanagement of the Estate, and that all of the loss that accrued was due to the manner in which the Trustee handled the Trust Estate. They particularly complain that the Trustee should have converted the eighty shares of stock in The H. N. Schuvler State Bank into money for the purposes of distribution; that the Bank had been guilty of devastation of the estate in that it accepted and attempted and did execute the provisions of the Trust Agreement, although they were not qualified under the banking laws of Illinois to either take or execute trusts; that the Bank was guilty of mis-



management of the Trust in that it took the amount donated to Amelia Granda and Louisa Clarke and converted it to its own use; that the Receiver of the Bank, acting as Trustee of the Comstock Estate, marshalled the assets of the Estate in a manner that was most advantageous to it, the Receiver of the Bank, and that the bank did not proceed to loan the money due to the First Presbyterian Church and the other individuals as directed by the Trust Agreement.

It is conceded by all the parties that The H. N. Schuyler State Bank had no power or authority whatever to accept and execute trusts, but the record in the case does not disclose any glaring evidence of misconduct in the handling of the funds of the Comstock estate. The fact that the eighty shares of bank stock were not converted into money but distributed in kind to the four residuary beneficiaries was not harmful to the trust estate because the cash would have been paid out at the time of distribution, either to the residuary beneficiaries or for other purposes connected with the settlement of the estate. This distribution was made in 1926 before the closing of the bank.

Because the bank was not qualified to accept or execute trusts does not affect the rights of the parties, especially when there is no proof of any mishandling of the funds. The money and the property of the estate appears to have been paid or delivered to the proper persons who were entitled to the same, and it was not established by the evidence that there was a diversion or misappropriation of the funds.

Just why the installments falling due to the Appellants Amelia Granda and Louisa Clarke on January 1st of each year after the death of Kate A. Comstock were not paid is not fully explained, but the Receiver in her answer states that she set aside a reserve sufficient to pay the legacies due to said Appellants and still has the full amount on hand, and is holding the same subject to the orders and dictates of the Circuit Court of Christian County.

Under the trust agreement H. N. Schuyler was given the sum of \$1,000.00. After the closing of the bank a claim was filed and allowed for this amount. It was later set off by the Receiver against a note that Schuyler owed the bank. A similar disposition was made of a bequest of \$500.00 to James Palmer. We can see no evidence of misconduct in such an adjustment of accounts.



Even though the terms of the trust were not promptly and accurately carried out by the Bank and its Receiver that does not in our judgment have any weight on the question of whether or not the claim or lien of the Appellees for enforcing stock liability was prior to that held by the Appellants. The full liability on the Comstock shares of stock had accrued prior to the death of Miss Comstock. This is definitely shown by Certificates of deposit and savings account books offered in evidence.

The Constitution of the State of Illinois, Article XI, Section Six, provides that—

"Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock, by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder."

Our Courts have frequently held that the estate of a deceased stockholder is liable upon the stock held and owned by the decedent in the same way and to the same extent that the stockholder was liable in his lifetime. The only manner in which an estate can be relieved of this constitutional liability as a stockholder is by compliance with the provisions of the Administration Act and by the appropriate of the ground Exterts of

tion Act, and by the running of the general Statute of Limitations. Sanders v. Merchants State Bank, 349 Ill. 547.

The fact that the bank, as Trustee, was authorized to sell the stock and failed to do so did not relieve the

to sell the stock and failed to do so did not relieve the stock of its primary liability to the creditors of the bank which accrued before the death of Kate A. Comstock.

It is further contended by the Appellants that the Statute of Limitations has run against the claim of the Appellees: that the funds of the estate had been distributed to the Trustee for the benefit of the cestui que trusts and were no longer a part of the Estate of Kate A. Comstock. The indebtedness upon which the liability in this case is based is represented and shown by a large number of certificates of deposit, which were payable on presentation after maturity and endorsement of the respective certificates. Also upon a number of savings accounts which were represented by pass books which provided for the withdrawal of the money upon presentation of the pass book and the giving of a receipt. All of these evidences of indebtedness were in writing and hence the ten year Statute of Limitations applies. The records of the bank show



that interest was credited on nearly all of the certificates as late as 1929, and that the last interest was credited on the savings accounts during the last year before the bank closed. The bank closed on February 6, 1930. It would seem by such records that all of these debts were clearly renewed within the last year prior to the closing of the bank. The amendment to the complaint filed by the Appellees, by which Appellants were made parties defendant was filed September 4, 1934.

While a large part of the distribution of the trust estate was made during the years 1925 and 1926, the funds due to the Appellants were never definitely set off to the trustee for the benefit of the cestui que trusts and segregated from the assets of the estate. After the decree was entered in the liquidation suit allowing the claims of the Appellants to be preferred and in the aggregate sum of \$7.425.00, Nora Molz, as Receiver of the Bank, set up as a reserve the said amount in order to pay the said preferred claims, and by her answer and report filed in said cause still has such sum in her hands awaiting the order of Court as to the proper parties to pay the same. It is our judgment that the suit filed by the Appellees in May 1930, and as amended in September, 1934, for the purpose of collecting the constitutional liability of the stockholders was not barred by the Statute of Limitations and the Court correctly found that the sum of \$8,000.00, be recovered from any monies in the hands of Nora Molz. as Receiver of The H. N. Schuvler State Bank, which were identifiable as coming from the estate or trust fund of Kate A. Comstock, deceased. Also that the claim of Appellees be satisfied first and prior to the preferred claims of the Appellants.

The compromise and release of the liability of Ruth Schuyler Cole, owner of twenty shares of the bank stock, wholly independent and entirely separate from any of the 80 shares belonging to Kate A. Comstock during her lifetime, did not operate as a release of the

liability of any other stockholder.

In July, 1936, the Appellants filed a petition in the liquidation suit asking for the discharge of The H. N. Schuyler State Bank and Nora Molz, Receiver of said Bank as Trustees of the said Trust Estate. While it is clear that the said Bank was not authorized to accept or execute trusts, the Appellants in this case dealt and co-operated with the bank in the capacity of Trustee over a period of several years, accepting payments upon their particular bequests. The record

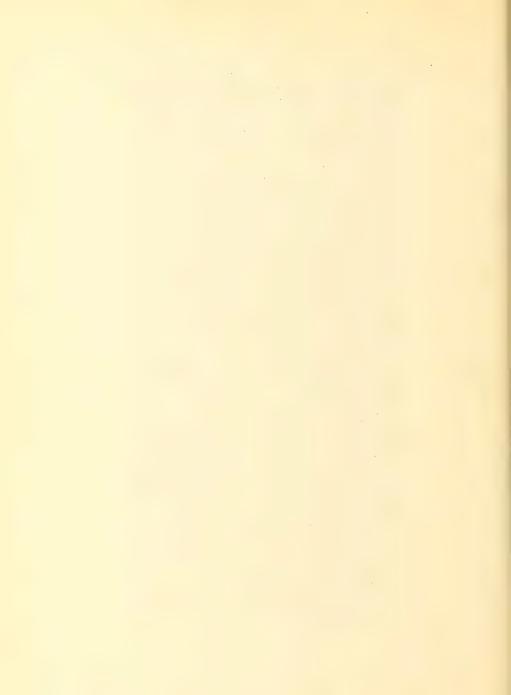


shows that everything has been paid of the Trust funds of the Comstock Estate, except the amount of \$7,425.00 reserved by the Receiver to meet the preferred claims, the payment of which is subject to the order of the Circuit Court. Under such circumstances the removal of such Trustee would accomplish nothing and might necessitate additional costs. Such petition was properly denied.

We believe the Circuit Court further correctly held that the Appellees as complainants in the stockholders liability suit were not entitled to recover from the Appellants, First Presbyterian Church, Louisa Clarke and Amelia Granda, the several sums paid to them by the bank, or the receivers of said bank prior to their having been made parties defendant to said suit. All of such payments were made voluntarily and without any notice that the claim of Appellees would be asserted later. As to such payments the Appellees were clearly suilty of laches and can not now recover.

Appellants challenge the jurisdiction of the Court to entertain the stockholders liability suit because they say the Statute does not authorize the bringing of any cause of action of this character against anyone but the stockholders and that Appellants were not stock-The right of creditors to sue in equity to enforce stockholders liability has been repeatedly uphold by our Courts. Sanders, et al. v. Merchants State Bank, et al. 349 III. 547. American National Bank v. Holsen, 331 III, 622. In the latter case the Court held that the two facts essential to sustain a decree enforcing liability of a stockholder are that the plaintiffs should be creditors and the defendants found to be stockholders. In Union Trust Co. v. Shoemaker, 258 Ill. 564, it was held that where a claim against a deceased person has remained contingent during the whole period allowed by law for presenting claims against the estate and does not ripen into an absolute liability until the estate has been distributed to the legatees under the Will, the claimant may maintain a bill in equity against such legatees to reach the property of the estate received by them. The funds sought to be reached were in the hands of Nora Molz, as Receiver, and as such she became an equitable garnishee. and the Court had jurisdiction to reach said funds by a suit in equity.

It is our judgment that the trial Court did not err in his findings or in the Decree entered and the same is therefore affirmed.



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Louise Wist, As Administratrix of the Estate of Arthur

B. Wist, deceased, Plaintiff-Appellee, v. Norman

B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company,

a corporation, and Thomas C. Russel,

Gen. No. 9145

Defendant-Appellants. 205 I.A. 167

Mr. Justice Hayes delivered the opinion of the Court.

This case grows out of a railroad-crossing accident in the Village of Sibley, Illinois, on December 18, 1936,

in which plaintiffs decedent was killed.

Sibley, Illinois, is an incorporated village of about four hundred inhabitants, located in Ford County. State route number 47 runs north and south on the west edge of the village, and about half a block west of and parallel to the Wabash railroad. The principal business block is on Sciota Street, and runs north and south. The Wabash railroad runs generally north and south bearing at a slight angle in a northwesterly direction as it comes into the village from the south and goes through the village. Ohio Street runs east and west and is the main thoroughfare connecting route 47 with the business section. The intersection of Ohio Street and Sciota Street constitutes the principal business corner of the town. The main track of the Wabash railroad intersects Ohio Street at an angle less than a right angle, being eighty two degrees twenty one minutes. The depot is located just north of Ohio Street on the west side of the tracks. In addition to the main track, at the intersection of Ohio Street, there is a passing track which is 13.1 feet east of the main track, and a house track which is 11.1 feet east of the passing track. These three tracks which cross Ohio Street are planked. The crossing has the usual post and cross-arms bearing the word "railway crossing". The intersection of Sciota and Ohio Street is two hundred sixty feet east of the Wabash main track. The Brandt Grocery Store is located at the northeast corner of Sciota and Ohio Street. At about eleven thirty o'clock on the morning of the day of the accident, Arthur B. Wist stopped at the Brandt Store. He had



a heavy load of flour and other merchandise on his truck. He received an order for sixteen sacks of flour which he unloaded. He was late on his route and in a hurry and suggested to Mr. Brandt that they let the pay for the flour go until the next trip. He had been calling at the Brandt Store since the preceding April from one to three times a month, coming in from Bloomington on State Route 165. At Sibley, both state routes 47 and 165 are located on the west side of the Wabash track and do not run directly into the village. Most of the traffic from these state routes coming into the village cross on Ohio Street. The daily average of motor cars crossing the Wabash track at Ohio Street runs from three to four hundred. About one block south of Ohio Street and on the west side of Sciota Street is a concrete, block garage building, that extends from Sciota Street west to within sixty or seventy feet of the east rail of the Wabash main track. Just south of Ohio Street and off the east side of the rightof-way of the Wabash railroad and parallel to the track there are a row of trees,—ten in number—then two additional trees just east of the last tree on the south end. These trees are from twelve to fourteen inches in diameter and sixteen to seventeen feet apart. There is a tool house nine by fourteen, ten feet high which is five hundred forty-four feet south of Ohio Street and twenty five feet east of the main track. At the southwest corner of the intersection of Ohio and Sciota Street is a frame building occupied by Doctor Absher as an office and just west of that is another frame building used as a beauty shop. The west side of this last building is one hundred fifty-eight feet east of the Wabash main track.

It appears from the record that when Arthur Wist left the Brandt Store, he could look down Sciota Street across the fields south of the village and see the Wabash track. After he left the intersection, his view to the south was obstructed first by the doctor's office; second by the beauty shop; and after he passed these, by the garage building which is about one block south of the doctor's office and runs within seventy feet of the track. Traveling west far enough to clear the west side of the garage building, his view was partially obstructed by the row of trees and the small tool house just west of the garage. The fact that the track bore at a slight angle to the southeast from Ohio Street, narrowed the distance from which he could see. The elevation of the track on Ohio Street and the territory



adjacent to the south were about on a level. At the time of the accident, the deceased was in the employ of the General Mills Inc., driving their Ford V-8, one and a half ton truck, 1936 model, paneled body, cab enclosed with glass.

The train in question was a passenger train having six cars, which was twenty-four minutes late and was traveling at about seventy miles per hour. They had left Decatur twenty-five minutes late. The train had scheduled two stops between Decatur and Chicago, one at Forrest for water, and one at Englewood to discharge passengers. The accident happened at twelveeighteen P. M. The engineer testified that he made the station whistle for Sibley one long blast of the whistle, and at a quarter of a mile south of Ohio Street, he started the crossing whistle, which consisted of two longs, one short, and one long blast, which continued from the whistling post up to the crossing. As he finished the second blast, he noticed a car through the trees coming at a moderate rate of speed, whereupon he changed his whistle from the regular crossing whistle to successive short blasts trying to attract the attention of the driver of the car, and then set his brakes in emergency. It was too close, "he couldn't save him''.

The plaintiff produced one witness that stated he didn't hear any whistle, but the defendants had a number of witnesses who testified definitely on this point, which clearly shows that the whistle was blown in the manner described in the engineer's testimony. It was in the Winter and the cab windows in the truck were closed. At this same time and just north of the crossing on the house track, a box car was standing, and just a block north of the crossing on the east side of the track—and close to the house track—was a large grain elevator which obstructed the view, to some extent, from the north. The records shows that Arthur Wist approached the crossing at a very slow speed. Some witnesses put it at the rate of three miles per hour and some at the rate of five miles per hour. A fair analysis of the evidence and of the surrounding circumstances show that at a point thirty-three feet east of the east rail of the main line, he could see the track south for about four hundred fifty feet. The decisive point in the case is whether or not he exercised due care for his own safety or was guilty of contributory negligence. In considering this point we are dealing in seconds. With the train traveling at seventy



miles an hour, there is but three or four seconds time between the time he first had an opportunity to see the train and the collision. At that time he was called upon to watch from the south as well as the north. In passing upon his conduct at this crucial moment, we have to face the situation as it appeared to him.

It appears from the record that he had passed the first two tracks and was on the main track by the time of the collision, as the truck was thrown north and to the west side of the track and up against the depot building. The engineer testified, "He was three or four hundred feet south of the crossing when I changed the whistle from long blasts to short blasts." The fireman testified. "Why he blew two blasts of the whistle then gave a warning whistle and at the same time set the air in emergency and the crash came right now." The computation of time: the position of the train; and the situation of the deceased at a given time are all question of fact for a jury.

A train runs on a fixed track and is slow to start and slow to stop, and cannot be steered around objects or obstructions. A railway crossing is a known place of danger and a driver approaching the railway crossing with an oncoming train which he has knowledge of. or in the exercise of due care for his own safety he could ascertain, he is required to stop, and if he fails to do so, he is guilty of contributory negligence which

bars the right of recovery.

Counsel for defendants with great emphasis insist that, under the record, they are entitled to a finding by this court, and that the verdict is manifestly against the weight of the evidence. With this view we cannot agree, but it does appear that it is a close case on the

evidence.

Plaintiff charges in her complaint that this was a dangerous crossing; that the railroad provided no watchman, gates, wig-wag signals, light signals, bell signals, or other mechanical signal at said crossing to give warning of the approach of trains. The proof showed the only safety warning given by the railroad was the statutory cross-arms with the words "railroad crossing" thereon.

In the case of Wagner v. T. P. & W. R. R. Co., 352

Ill. 85, the Court says:

"The rule in this state is that one crossing a railway track must approach it with an amount of care commensurate with the known danger, but if the existence of the track would not be revealed to one



in the exercise of reasonable care the rule cannot apply. A railway company in the running of its trains is required to exercise ordinary care and prudence to guard against injury to those who may be traveling upon the public highway in crossing its tracks. The fact that the statute may provide one precaution does not relieve the company from adopting such others as public safety or common prudence may dictate. The ringing of a bell and the blowing of a whistle are not alone sufficient to excuse a railroad company from maintaining other means of warning the traveling public when conditions are such as shown in the case at bar."

While it is true that the public is demanding lighter and faster transportation and the railroads, in keeping pace with the progress of the times, are warranted in furnishing this service, yet in doing so they should bring up the crossing signals for the traveling public so as to keep pace with their increased speed. The whistle, bell and cross-arm that served for so many years when trains were run from twenty to thirty miles an hour are lacking in public safety for the modern-day, stream-lined passenger train which travels at a rate three or four times as fast.

Defendants contend that the deceased and his emplover were under the Workmen's Compensation Act, although this does not expressly appear in the record, except by an affidavit filed in support of a motion for a new trial and after verdict. All that the record shows is that the deceased was in the employ of the General Mills Inc., and worked out of Peoria, Illinois, selling and delivering articles of food with a Ford truck. Defendants further contend that plaintiff should have alleged that defendants were engaged in Interstate Commerce, and were not under the Act. It appears from examination of the pleading that in each of the four counts that were submitted to the jury, the defendants were charged with possessing, using and operating a certain railway which said railway then and there extended from the City of Chicago, in the State of Illinois, through the corporate limits of the Village of Sibley, in the County of Ford in the State of Illinois, thence in a southwesterly direction through the State of Illinois to the City of St. Louis, in the State of Missouri, and that said defendants were also then and there possessed of and operating a locomotive engine with a train of baggage, express, mail and passenger cars attached on said railway, and although



the pleading does not specifically state that the defendants were engaged in Interstate Commerce it states sufficient facts from which that inference can be reasonably deducted. This allegation would, in all probability, be insufficient when tested before trial and verdict by a motion to strike, but after verdict where no motion has been made, it is ample to support the verdict.

After verdict, the rule by which pleadings are construed against the pleader is reversed and anything necessary to be plead which may fairly be inferred from the declaration may be regarded as alleged. Wagner v. C. R. I. & P. Ry., 277 Ill. 114. The question raised in the Wagner case was whether the declaration sufficiently charged that Wagner was engaged in Interstate Commerce at the time he was injured. The language used was ambiguous and cumbersome. In

passing on this point, the court says:

"The declaration as tested by a demurrer might properly have received that construction, since it referred to the previous averment that the defendant was engaged in inter-State commerce, but after verdict the rule by which pleadings are construed against the pleader is reversed and anything necessary to be proved which may fairly be inferred from the declaration will be regarded as alleged. A favorable construction of the declaration to support the verdict would be that the defendant being engaged in inter-State commerce, and it being the duty of the plaintiff, as an employee, to couple the cars, it might fairly be inferred that he was engaged at the time in an act included in the business carried on by the defendant in inter-State commerce."

A railroad company engaged in Interstate Commerce is not subject to the Workmen's Compensation Act.

Goldsmith v. Payne, 300 III, 119.

The trial court denied defendants' motion for a severance. The engineer of the train in question was joined as a defendant with the receivers of the railroad company. We are of the opinion that the ruling of the court was correct. Error is assigned on the form of verdict given by the court which did not separate the defendant, Russell the engineer, from the receivers. Only two forms of verdict were given for the defendants,—one finding the defendants all guilty, and the other finding the defendants not guilty. In the case of Meece v. Holland Furnace Co., 269 App. 164 (Third District), this court says:



"It necessarily follows that if the agent charged with the commission of the act complained of be not guilty, a judgment could not be recovered against appellee, the principal, upon the ground of respondeat superior. The judgment in this case in favor of the City of Chicago is a complete bar to an action against the appellee for its negligence in exercising any permissive rights appellee may have granted it. To make appellee liable upon the theory under discussion, a case must have existed against the city." To the same effect are Anderson v. West Chicago St. R. Co., 200 Ill. 329; Larson v. Hines, 220 Ill. App. 594; Bunyan v. American Glycerin Co., 230 Ill. App. 351. In the last case cited the court held: "In this State the law is well settled that where an action on the case is brought against two defendants and one of them is liable only on account of the rule of respondent superior for the negligence of the other, if the latter is found not guilty such finding is a complete bar to the action against the former. Hayes v. Chicago Tel. Co., 218 Ill. 414; Anderson v. West Chicago St. R. Co., 200 Ill. 329; Antrim v. Legg, 203 Ill. App. 482; Larson v. Hines, 220 Ill. App. 594; Billstrom v. Triple Tread Tire Co., 220 Ill. App. 550. The weight of authority outside of Illinois seems to be to the same effect. Doremus v. Root, 23 Wash. 710, 54 L. R. A. 649; Hayes v. Chicago Tel. Co., 218 Ill. 414. 2 L. R. A. (N. S.) 764; McGinnis v. Chicago, R. I. & P. Ry. Co., 200 Mo. 347, 9 L. R. A. (N. S.) 880; Southern Ry. Co. v. Harbin, 135 Ga. 122, L. R. A. (N. S.) 404; Hobbs v. Illinois Cent. R. Co., 171 Iowa 624, L. R. A. 191 7 E. 1023."

In the present case, the charge by the plaintiff is the negligent operation of the train as it approached and crossed the crossing in question, while under the complete control of the engineer. If he was guilty, the receivers were guilty under the doctrine of respondeat superior, and if he was not guilty, the receivers were not guilty, so that the trial court was warranted in instructing the jury in the form that it did.

The defendant Thomas C. Russell, the engineer, was called by plaintiff in plaintiff's case in chief, under section 60 of the Civil Practice Act, for cross examination by the adverse party and after this cross examination was completed, the defendants asked the court to be permitted to cross examine him. This was denied,



in which ruling there was no error. Counsel in their brief now suggest that what they intended to say was, for leave to examine. Upon examination of section 60, and taking into consideration rules of practice and procedure in a nisi prius court, the defendants were properly entitled to examine him as is usual on what is commonly called re-direct, for the purpose of clarifying or explaining evidence brought out in the cross examination, but the request in the trial court was not for this, but for the right to cross examine. It appears from the record that this witness was afterwards called in behalf of the defendant and testified fully on the case so there was not error in this regard.

In the giving and refusing of instructions and in the arguments of counsel at the trial, we find no error sufficient to warrant a reversal. The case was properly submitted to a jury on questions of fact under the issue. Nothing appears in the record to warrant setting aside the verdict of the jury, nor the judgment of the

court below. It is therefore affirmed.

Judgment Affirmed.

14 (A-19598—14)

In the Matter of the Estate of Santi Paffi, Incompetent, Joe Menichetti, Conservator, Appellant, v. Frank

T. Hines, Administrator of Veterans'

Affairs, and H. R. Pool, Guardian ad Litem for Santi Paffi,
Incompetent, Appellees.

Gen. No. 9218

305 T.A. 16

Mr. JUSTICE HAYES delivered the opinion of the

This is an appeal from an Order and Judgment of the Circuit Court of Sangamon County, which affirmed the Probate Court of Sangamon County in sustaining objections to an investment of nine thousand five hundred (\$9,500.00) dollars, made by Joseph Menichetti, Conservator of the Estate of Santi Paffi, Incompetent, in mortgage bonds of the Joseph Brothers Lumber Company, and charging the conservator with said amount, together with the accrued interest, aggregating thirteen thousand three hundred (\$13,300.00) dollars.

It appears from the record, that the conservator, before making these investments, had applied for and obtained the approval of the Probate Court of Sangamon County, and had annually filed a report of his acts and doings, which reports were approved by the Court up to July 20, 1933. The subsequent reports were not approved as to the investments in the Joseph Brothers Lumber Company Bonds. No guardian ad litem was appointed or appeared for the Ward at the time of conservator's application for authority to make the investments in question, nor was any notice given to the ward or to anyone on his behalf. These proceedings were ex parte.

The conservator filed a current report in the Probate Court, covering the period from July 20, 1933, to July 16, 1934. The Administrator of Veterans' Affairs filed objections to said report, on the grounds that said investments were not legal as investments of conservatorship funds. The objections were sustained by the Probate Court, and an order was entered by that Court setting aside, first, all former orders authorizing said investments, and second, the several orders ap-



proving the various reports of the conservator. An appeal was taken to the Circuit Court of Sangamon County, and H. R. Pool, Attorney for the Veterans' Administration, was appointed guardian ad litem for the insane ward, whereupon he adopted the objections of the administrator of veterans, affairs, formerly filed in the Probate Court. The Circuit Court entered an order holding that said Joseph Brothers Lumber Company Bonds were not secured by a first mortgage; that all orders of the Probate Court approving said investments were void; and that the estate of the Ward was entitled to recover from the conservator the sum of thirteen thousand three hundred dollars. The Court further sustained the order of the Probate Court disallowing said investments. The mortgage bonds of Joseph Brothers Lumber Company defaulted in the payment of their interest in 1934.

At common law a conservator has authority to loan the funds of his Ward. Our statute has limited this authority by setting out specific classes of loans the conservator may make, and provides that loans upon real estate shall be secured by a first mortgage or trust deed not to exceed half the value thereof. It further provides that all loans shall be subject to the approval of the Court. Ill. Rev. Stats., Ch. 86, Sec. 18.

One of the principal objections of the guardian ad litem to the investments in question is that the mortgage instrument gives the mortgagor the right to sell the mortgaged premises, or some part thereof, with the consent of the trustee, but without the consent of the bondholders, and to use the proceeds of the balance to redeem outstanding bonds or to purchase or construct additional physical property for the company. He contends that the provision of the trust deed could be so construed as to authorize the mortgagor, with the consent of the trustee, to sell a part of the land and with the proceeds to purchase or construct additional physical property for the mortgagor, and that this provision of the deed would authorize the company to sell part of the land and to purchase different and less valuable land, in lieu thereof, or to construct physical property which would include personal property for the mortgagor to the detriment and loss of the bondholders.

The Statute in question is mandatory in its provisions, and the Probate Court is limited in authorizing only those investments included within the specific language of the Statute. Any order of the Probate



Court not within the intent and meaning of the Statute is absolutely void and of no effect, and provides no protection to the conservator who, in the event of loss, seeks to rely upon the order.

The clear meaning of the language used in the Statute, "loans upon real estate shall be secured by first mortgage or trust deed thereon, and not to exceed half the value thereof" is that the mortgages shall become possessed of an equitable first lien upon specific land, to secure the payment of the debt, which lien, so to speak, follows the land, and it is clear that the instrument in question which permits release of the specific land without payment of the debt and without consent of mortgagee, and permits a substitution of other property either real or personal does not meet the requirements of the Statute in question.

Where, as in this case, the investment is made in part only of a large number of bonds secured by the same mortgage or trust deed, the individual bondholders must be provided, "under the mortgage instrument" with parity of lien if the mortgage bond is to

be regarded as qualifying under the Statute.

"Where a mortgage secures several notes there is only one lien to secure the entire debt. The statute is directed at the kind and quality of the mortgage. A note which by reason of its earlier maturity has priority over all other notes secured by a first mortgage is as effectually prior to all other liens as if it were the only note secured by the mortgage. If it is on a parity with the other notes, it is none the less secured by a first mortgage unaffected by the ownership of the other notes, and a mortgage which secures a note subject to the priority of earlier maturing notes is not a first mortgage as to that note." In re Lalla's Estate, 362 Ill. 621.

The Statute provides that the loan shall not exceed one-half the value of the land mortgaged as security. Therefore, the Court must look to the value of the specific land mortgaged to assure that it has value equivalent to twice the amount of the loan. This contemplates a continuing lien upon the same specific land, for, if there be power in the mortgagor to substitute, the value of the substituted land may not be twice the amount of the outstanding loan. Hence the Statute requires a continuing mortgage lien upon certain specific land worth twice the amount of the loan.

The contention of appellant that the loans in question were approved by the Probate Court, and that



the current reports showing they were approved by said court was final and afforded protection to the conservator, notwithstanding their failure to meet the requirements of the statute, is not tenable. In the case of In re Lalla's Estate, supra, this same point was raised. There the Kellogg investments were purchased under the authority of prior orders of the Probate Court, and also were recited in the fiduciary's intermediate reports, which were approved by the Court. The Court determined that the notes in the Kellogg case, which were subject to the priority of other notes maturing earlier than those purchased by the guardian, were not first mortgage loans in the sense of the Statute, and the objections to these loans in the Kellogg Estate were sustained, regardless of the fact that the Probate Court had definitely authorized that the investment be made.

The Supreme Court in affirming the Appellate Court in reference to the Kellogg paper stated in its opinion:

"The remaining notes acquired in the Kellogg case were subject to the priority of other notes maturing earlier than those purchased by the guardian and were not first mortgage loans in the sense of the statute. The acceleration clause in case of default did not affect such priority. The objections to the approval of these loans were correctly sustained."

We, therefore, are of the opinion that the order of the Probate Court which was affirmed by the Circuit Court, was proper, and for the reasons herein stated, we hold that the Order and Judgment of the Circuit Court should be and is hereby affirmed.

Judgment Affirmed.

14 (A-19598—14)



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present --- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

305 I.A. 168

BE IT REMEMBERED, that afterwards, to-wit: On. APR 201940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

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Gen. No. 9517

Ag. No. 10.

IN THE APPHLLATE COURT OF ILLINOIS SECOND DISTRICT

FEBRUARY TERM. A.D.1940

Lewis H. Armstrong, Plaintiff,

Appellee

Appeal from the Circuit Court of Whiteside County. Illinois.

Ben Sharer

Defendant, Appellant.

WOLFE, P.J.

Lewis H. Armstrong brought a suit in the Circuit Court of Whiteside County, Illinois, against the defendant, Ben Sharer, in an action of trespass. The complaint filed consisted of four counts. The first three counts charge that the defendant did break and enter a certain corn crib belonging to the plaintiff, and took therefrom, corn valued at \$500.00. The fourth count charges the defendant with willful and wanton trespass in taking the corn, and asks for damages in the sum of \$5,000.00. The defendant filed his answer, which is a general denial of all the allegations set forth in the complaint.

The evidence of the plaintiff shows that he was a tenant on the farm in Rock Island County, Illinois, which was owned and controlled by Miss Cora Von Steenbergh of Indiana. Under the terms of the lease, the owner was to receive one-third of all crops raised upon the farm as rent, including soy beans and sorghum. The soy beans and sorghum raised upon the farm had been sold by the plaintiff, but the proceeds not accounted for to the landlord. The corn had been picked and placed in a double crib. The man who operated the mechanical corn picker testified that as he picked the corn, he would pick six rows for the tenant and four rows for the landlord. The corn was hauled to the crib as picked.

The defendant, Ben Sharer, owns and operates an elevator at Albany, Illinois. He, together with several of his employees,

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MOLEN, D. J.

Lewis H. Irrathrong brought a suit in the Circuit Court of Whiteside County, Illinois, ageinst the defendent, Len Sharer, in an action of trespand. The outplaint filed consisted of four to an action of first three counts charge that the defendant did counts. The first three counts charge that the defendant did and took therefrom, corn valued in \$500.00. The fourth count or year the defendant view willful and wanten transpare in thring corn, and asks for hanges in the int of \$5,000.00. The condent filed his areser, which is a general denial of all the

The evidence of the plaintiff shows that he was a tenent on the farm in Rock Laland County, Illinois, which was owned and of the farm as caner was to receive one-third of all a raised upon the farm as rent, including soy bosns and i. The sey bosns and sorghum raised upon the farm had been the procesds not accounted for to the the carm had been picked and placed in a double crib.

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went to the crib in question, and started to shell the corn, but the sheller broke down, and the corn which was shelled was hauled to the elevator. The balance of the corn in the crib, with the exception of thirty or forty bushels, was hauled away by Er. Sharer. At the time Mr. Sharer took the corn, there was some dispute between Armstrong and Sharer, as to the ownership of it. Armstrong claimed that Sharer had no right to take it, as the corn belonged to him. Mr. Sharer claimed that he had bought the corn from Ess Von Steenbergh. The plaintiff did not claim the corn on the west side of the crib, but admitted that was rent corn, but did claim all of the corn on the east side of the crib.

The defendant called Sylvia Young who said she lived in Frankfort, Indiana. She testified that on November 19, 1938, she went to the farm with Miss Von Steenbergh where Mr. Armstrong was picking corn, and that she heard a conversation between Wiss Von Steenbergh and Mr. Armstrong; that they discussed the picking of the corn and Mr. Armstrong said that the best place to sell the corn was to Mr. Ben Sharer; that Miss Von Steenbergh said that she was going to stay until the entire/crop was picked, shucked and delivered to the elevator; that she and Miss Von Steenbergh, on Thanksgiving Day, went to the home of Mr. Armstrong and had a conversation with him relative to the corn, and Mr. Armstrong said that Miss Von Steenbergh could take eight hundred bushels of corn for her share of the crop, and that Ben Sharer would shell the corn: that Armstrong said that he owed Miss Von Steenbergh for one-third of the sorghum and beans and he would pay Miss Von Steenbergh/onethird with corn; that if there was not eight hundred bushels of corn in one crib, that Mr. Sharer should go to the other crib and take enough to settle on a basis of eight hundred bushels; that Mr. Sharer should go to the west crib first, and if there wasn't enough to make eight hundred bushels, then he should go to the east crib and remove enough of that corn to make a total of eight hundred bushels.

the sholler broke low, and the sern wish was shelled was hunled to the elserter. The belones of the cern in the erib, with the exception of thirty or ferry bushels, was hanled away by ir. Sharer he time it. Shere was some dispute between the it. Sherer, as to the emership of it. Temetrong tween immetrency and sherer, as to the emership of it. Temetrong elaimed that there will be the concerning of this. Since the ser belonged to him. In. Shere a claimed that he had beauth the some from Steenburgh. The plaintiff did not claim the sore from the west also of the erib, but edithed that was rent corn, but tid elaim the elaim.

The defendant called Svivia Young who said she lived to President, Indiana. She bastified that on Movember 19. 1998, she went to the face with hiss for Steadberch where in agu maonteuri pickin cors. and that she beend a conversation between liss Von Steambergin and its - Armatanara; Stat trad trade and trade and variety of and lies of such just that that the recording all bus not the and the die district that Mar or very beauth and the trace was going to stay until the entire/erop was micked, shacked and delivered to the elevator: that she and hise Von Steenharch. iving Day, went to the home of Mr. Ermetrone and had a conbise treation with him relative to the error and it imetrove that this Ven Steunberch could take eight hurdred bushels for her share of the erop, and that hen share would shall the corn; briditory said that he owed Mas Vom Steenherry for ore-third and the simulation of the contract of the state of the state of the To seems that it there was not old to hundred busies of one crib. that it. Sharer should so to the other crib and the sale had been my as to to a head a no officer of diames and Place bailed to man profit date from our service according edi ot og bluede si mede aledeut taglame title at the corn to make of the corn to make a total of eight ALREAD BA

Cora Von Steenbergh testified that she lived in Frankfort, Indiana, and owned the farm rented to Mr. Armstrong: that she was on the farm on the 21st of November and had a conversation with Mr. Armstrong: that Mrs. Young was present when she had a conversation with Armstrong in regard to the rent for the place, and Armstrong said that he would settle for eight hundred bushels of corn; that he first said he would settle by dividing and picking the rows and she said that she would only settle by actual bushels; that he was supposed to deliver the corn to the market; that Armstrong said that she was to get eight hundred bushels of corn, and pay for one-third of the crop which should be one-third of the sorghum, one-third of the beans, and her share of the corn and to cover the expense of hauling it to the market; that she said if there wasn't eight hundred bushels of corn on the west side of the crib, that they would take enough out of the east side to make up the eight hundred bushels, and that Mr. Armstrong said that that would be all right; that she then went to Mr. Sharer, sold the corn to him and Mr. Sharer was to go out shell and haul the corn.

Mr. Ben Sharer testified in his own behalf, and stated that he was in the grain, elevator and coal business at Albany, Illinois; that he had known Mr. L. Armstrong for quite a while; that he knew the Von Steenbergh farm, which is about eight miles southwest of Albany; that about Thanksgiving time of 1938, Miss Von Steenbergh came to him and wanted him to go to the farm to get sight hundred bushels of corn; that he bought the corn from her; that she went to the farm with him and showed him where the corn was; that she was there with him on two different occasions; that he went to the place and got the corn which actually weighed six hundred fifty-one bushels; that he paid Miss Von Steenbergh for this corn. He also testified in regard to Mr. Armstrong having a conversation with him regarding the price of the corn when he was getting the corn at the crib; that while they were shelling the corn, the sheller broker and the last of the corn was taken out in the ear. The evidence shows that there were three hundred twenty-nine bushels of corn in the west crib.

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would be all right; that alse then most to Mr. Sharer, sold the count to him and Mr. Sharer was to to out shell and that the count is a count in the cus be also be also that

that he had known Mc. I. Assertions for pales a shile; that he know the you steembargh farm, anded in about sight while nonthered of constant to go sight and wented in the constant to got sight and sent to bought the cosm from her; that the west to the sent to the same the the corn west that she was the farm with him and alones him where the corn west that she was the place if the corn which setunity weighed six hemotral fifty-one bushels; and the corn which setunity weighed six hemotral fifty-one bushels; paid like Ven steenborgh for this corn. He also testified are shelling the corn, the sheller broke; and this festified

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In rebuttal Mr. Armstrong said that he told Miss Von Steenbergh he would give her one hundred wifty bushels of corn for her share of the sorghum and beans, but denied promising her that he would give her eight hundred bushels of corn. On cross-examination he admitted that Miss Von Steenbergh and Mrs. Young asked him for eight hundred bushels of corn, but he said, "I didn't tell them nothing."

The case was submitted to a jury who found the issues in favor of the plaintiff and assessed his damages at \$570.00. Judgment was entered on the verdict and it is from this judgment that the appeal is prosecuted. The question for this Court to decide, "is whether this verdict is supported by the preponderance of the evidence." It has long been the law that a verdict of a jury on a controverted question of fact should be final and binding upon a court of review, unless the verdict is manifestly against the weight of the evidence. From a review of all of the evidence in this case, it is our conclusion that the verdict of the jury is against the manifest weight of the evidence, and that the judgment should not be allowed to stand. The judgment is therefore reversed and the cause remanded.

Reversed and cause remanded.

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STATE OF ILLINOIS,	
STATE OF ILLINOIS, SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the	State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,	
of record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and thirty
	Clerk of the Appellate Court
(73947)	



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFINN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk 305 L.A. 484

E. J. WEITER, Sheriff

BE IT REMBERED, that afterwards, to-wit: On MAY 10 10+0 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

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Program -- the Hell Hill G. Fally, Procedity draming. Heat William U. Danier IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D. 1940.

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THE PEOPLE OF THE STATE OF ILLINOIS, et al,

Appellees,

VS.

HERBERT R. JONES, et al, COLUMBIA CASUALTY COMPANY, et al,

Appellant and Co-appellant.

APPEAL FROM THE CIRCUIT COURT OF WILL COUNTY.

DOVE, J.

At the November election 1930, Herbert R. Jones was elected County Treasurer of Will County for a term beginning December 1, 1930 and ending December 3, 1934. He qualified and on November 15, 1930 entered into a bond as provided by law in the sum of \$250,000.00 with nine individuals as sureties. On January 27, 1931 he entered into the required statutory bond as County Collector in the sum of \$850,000.00 with eighteen individuals as sureties. On February 22, 1932 he again entered into another bond as county collector in the sum of \$755,000.00 with the Columbia Casualty Company as surety. On January 11, 1933 he entered into another bond as collector in the sum of \$300,000.00, also with the Columbia Casualty Company as surety.

On August 13, 1936 the People of the State of Illinois acting by and through the State's Attorney of Will County, filed the instant

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complaint for an accounting against the said Herbert R. Jones as County Treasurer of Will County and ex-officio county collector and the sureties on his several respective bonds to recover shortages, misapplication of funds and defalcations during his term of office. The complaint consisted of several counts and each prayed for an accounting between the People and the defendants and that a judgment be rendered against such of the defendants for the respective amounts due from each as the account might disclose. Answers, counter-claims and replies were filed and after the issues had been made up the cause was referred to a special master to determine whether an accounting should be had. While the cause was pending before the master a settlement was effected by the provisions of which the Casualty Company as surety paid to the County of Will 110,000.00 and 15,000.00 additional was paid by the individual bondsmen. 69,220.03, being the amount of money tied up in closed banks, was also paid to the County of Will and these several amounts aggregating: 194,226.03 were to be distributed among the various 118 taxing bodies lawfully entitled thereto. This settlement was duly approved by an appropriate resolution of the County Board of Supervisors on November 29, 1938 and all the taxing bodies except the Village of Frankfort and the Town of Joliet thereafter passed appropriate resolutions approving the settlement and accepting such distributive share as computed by the County Board and executed receipts therefor. On January 18, 1939 Albert H. Krusemark, as a taxpayer, the said Village of Frankfort and the said Town of Joliet were granted leave to intervene and their intervening petitions were filed on January 20, 1939. On January 27, 1939 Columbia Casualty Company filed its amendment and supplement to its answer setting forth that there had been a final settlement of the case pursuant to the resolution of the County Board of November 29, 1938 and

problem to out at extendible applied the self defects in form on courter within respective years electricate but grand fill to required -air he sinche revoser of abut evitences leaves aid no colfere application of funds as defetablean dering his tens of critica. or will beyone from him admire Jayanne, by beginning filled and will remaining a cold for principal wid the algorithm of their asserted published se rendered against avoir of the defanishment for the aparelia anomals and from each as the necessit title timesen, enables more entire sense end du aben case on a such all rotte bue helly even meilger bus mainman, as motions originate but refer in longe a of formally -aforga a ruses and erore think and some of the best ad b. was effected by the provisions of which the Cartain r derg any Lagrantia to the County of Mail City, OCC. CO and dispose to additional To tame; but pake (,E). 12,800 ... and and finitivitial out of ! ing file to grant the sleep sale par along the old granty of Les several amounts serrequiting 194, 001.03 sere to be distributed and the second countries of the second subject the second and plants the six to expected arthurston in the second and are femalished the state of Appendicular by Downson III and Mile and Appendicular being a property of the state were referred to the last of the section of the special and open non-polyment for a melitim of the brongs and before after the infrare its free proof but to brought at such periodichia On Fandery 16, 1937 Chbert H. Bruscherk, as a J. Afor he must piez end ! " Prominer: "to egalliv blas sid , gree brillying anticorrelat specialist assembled of court pattern when What is being the till the plant of the passet to belly griffee working aff of thereigens inn theminers asi . L Changing only and the Inner Diller Delite of male and what their larger AND VIEW YOU PRODUCE BY THAN THOSE AND BY WINDOWS AND MA

alleging that distribution had been made and accepted by 116 of the 118 taxing bodies which were entitled to participate in the distribution of said fund. In this amended and supplemental answer it was also alleged that this settlement also provided that the county should receive all dividends paid out by receivers of closed banks of public monies deposited therein and the settlement was made also without prejudice to the rights of the plaintiff to proceed against said Herbert R. Jones personally and averred that the county had executed its release to all sureties on all the bonds of Merbert R. Jones and had acknowledged the receipt of its share of the total amount of cash received by the county as provided in the settlement resolution of the Board of Supervisors. To this amendment and supplement to the Casualty Company's answer the plaintiff filed its reply admitting the allegations as to the settlement. The Village of Frankfort in its reply characterized the settlement as an "attempted" one and neither admitted nor denied the allegations of its amended and supplemental answer. The Town of Joliet filed no reply.

On May 22, 1939 the special master filed his report finding that the defendants were liable to account and recommending that a decree be entered to that effect. To this report objections were filed which were overruled and afterwards renewed as exceptions and upon a hearing had, the chancellor approved the report, overruled all exceptions thereto and on May 22, 1939 re-referred the cause to the special master with instructions to proceed to hear further evidence and to state the account. Thereafter and on June 7, 1939 the chancellor entered an order directing the Casualty Company to pay to the special master \$1,793.75 for services rendered by him and to pay to the reporter for his services the sum of \$1251.11. To reverse these orders and decrees the Columbia Casualty Company has appealed and most of the individual defendants have joined as co-appellants.

the distribution and been raio and accepted by the tering bedies which were entitled to participate in the distribution of said fund. In this manded and supplemental action it was I ... Lineau vincou est desi debivora osla decesittes sint teat beneffe receive all dividence build our by receives of closed banis of public greative cata chin car incachuses eil tar mistert beitaceb se Aire Jeriege Lessin of Wilhlish on to imply out or culturare herbert i. Jones personally and everys bure the county had envered bar came's it theoret to almost and his no epitorya ils or enseler ati deso lo varous lavos enta lo segúa elé to drissor por herbelmondes bad on's la relationer should be a province in the latter as your one ye bevisees d of Engertisors. To this energies and supplied in the fine Carmality -a effe elt maistiche yfrer est belif Trismiefr edt rewese s'yne vious at it is other and it is village of Transfert in its color -in tail for his any "information on an executive oil two transporter Industrations in a folgane will be anothered a out being to. Las wer. The Torm of soldet filed no really.

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2 services the sun of \$1251.11. To reverse these orders and

1 inchia Casuality Company has appealed and not to the
defendants have joined as ac-appealents.

The evidence found in this record discloses and the brief filed on behalf of appellee, the sole original plaintiff below, states that a valid settlement of all the issues in this case had been effected and that this settlement, legally effected, is the end of the case. The State's Attorney confesses that the decree of the chancellor is erroneous and should be reversed and suggests that this court find that the sum of \$5,737.21 due the Town of Joliet and the sum of \$67.67 due the Village of Frankfort be paid by appellant to the present County Treasurer of Will County for and on behalf of these bedies, to be withdrawn by them upon their giving a receipt therefor and that from the dividends of closed banks the additional sum of \$27.35 be paid to the Village of Frankfort and the additional sum of \$1,783.20 to the Town of Joliet. As to the order of June 7th, 1939 directing the payment by appellant to the special master of his fees and the fees to the reporter the State's Attorney states he is not interested.

After the record and the original briefs had been filed in this court, the order of June 7th, 1939 was complied with and satisfied and on March 9, 1940 this court upon appellant's motion dismissed its appeal so far as the order of June 7, 1939 is concerned and agreemble to the suggestion of the State's Attorney with reference to the \$5,737.21 due the Town of Joliet and the \$67.67 due the Village of Frankfort under the terms of the settlement, appellant did, on March 9, 1940, pay those sums to the present county treasurer for the benefit of these two taxing bodies to be withdrawn by them upon demand and upon giving proper receipts therefor. This was done with the express approval of appellee as shown by the stipulation of the parties hereto, together with the supplemental abstract of record.

The intervenors Village of Frankfort, Albert H. Krusemark and Town of Joliet have not followed this appeal, have not entered any appearances in this court or filed any briefs. The only appellee not "I septiment of the isome in this case had teen efforted at a filterial case in the case had teen efforted at a filter; and the case of the case of this case of the case of this case of the case of

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in default confesses that the decree appealed from should be reversed. The only two taxing bodies interested which were not expressly satisfied with the settlement and which had not accepted the benefits thereof have acquiesced therein by failing to follow the appeal to this court. Evidently there is no desire on the part of anyone to further engage in this litigation and as stated by counsel for all the parties appearing in this court, there is no occasion for further proceedings in this case. The order and decree of May 22, 1939 as against everyone to this record other than Merbert N. Jones is therefore reversed.

DECREE RIVERSED.

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STATE OF ILLINOIS, ss.	
SECOND DISTRICT J. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and	
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby	
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,	
of record in my office.	
In Testimony Whereof, I hereunto set my hand and affix the seal of said	
Appellate Court, at Ottawa, thisday of	
in the year of our Lord one thousand nine	
hundred and thirty	
Clerk of the Appellate Court	



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAIME HUFFIMM, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

BE IT REIEBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Torn, A.D. 1940.

JESSE P. HAYDEN.

Appellee,

VS.

FRED H. BREDEMEIER and ELSIE BREDEMEIER, Appellants. APPELL TROK THE CLACUIT COURT OF MAIKAKEE COUNTY.

DOVE, J.

On December 21st, 1937 Jesse P. Hayden filed his complaint and cognovit in the Circuit Court of Kankakee County and recovered a judgment by confession that day against the defendants Fred H. Bredemeier and Elsie Bredemeier for \$2655.00. Thereafter and on January 3rd, 1938 the defendants filed their motion supported by the affidavits of the defendants to open up the judgment and for leave to plead. These affidavits were, on motion of the plaintiff, stricken. Subsequently, by leave of court, an amended affidavit was filed to which was attached a copy of an instrument signed by the plaintiff and dated July 23, 1934 and addressed to John Krueger, Secretary-Treasurer of the Federal Land Bank and to the Land Bank Commissioner of St. Louis, hereinafter referred to. The trial court again sustained the motion of the plaintiff to strike the affidavit as amended, denied the motion of the defendants to open up the judgment and for leave to plead and directed that the judgment rendered on December 21, 1937 stand in full force and effect. From these orders the defendants have perfected this appeal.

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The amended affidavit of the defendant Fred H. Bredemeier states that on or about June 16, 1934 the defendants were indebted to the plaintiff in the sum of 20.410.00 and accrued interest: that at that time they were also indebted to John Weldt in the sum of \$1,000.00 and to F. J. Cloidt in the sum of \$2100.00; that in the Spring of 1934 at the request of the plaintiff the defendants applied to The Federal Land Bank of St. Louis and to the Land Bank Commissioner for loans to be secured by mortgages on certain real estate owned by the defendants; that loans were granted the defendants aggregating \$15,700.00; that on July 23, 1934 each of the said creditors of the defendants, including the plaintiff. agreed to scale down the indebtedness due them from the defendants and accept a smaller sum in full satisfaction of their claims against the defendants; that John Heldt agreed to accept . 800.00 in full satisfaction of defendants' indebtedness to him; that said F. J. Cloidt agreed to accept the sum of \$1800.00 in full satisfaction of defendants' indebtedness to him and the plaintiff agreed to accept in full satisfaction of defendants' indebtedness to him the sum of \$12,500.00 on or before August 1, 1934, or if paid thereafter to accept said sum of \$12,500,00 together with 6% interest thereon from August 1, 1934 to the date of payment. The affidavit then states that the plaintiff agreed that when said sum of \$12,500.00 and 6% interest from August 1st. 1934 was paid to him that all his claims against the defendants would be paid and satisfied in full. The affidavit then recites that thereafter said loans were obtained from The Federal Land Bank and the Land Bank Commissioner and that each of said creditors, including the plaintiff, was paid the respective amounts so agreed by them to be received by them in full satisfaction of their respective claims against the defendants;

The energed affidavia of the defendent fred I. Iredenelar herdeld age adminished out 1991, 30 and should no me that betate : two resai bourses has ob. Cil. Ca to more and at Tiliniels out of myn ent al fols, mint of rapidini only onew void only Jedf to tait of M. 200, 90 and to T. J. Claidt in the grap of 2100,00; that in admandate and Thiominis out to the west out to 1981 to maintag oil brul sit the Release to the Board as a said to believe - I Commissioner for Leves to be appared by mortgages on captain add havners were assol sind : edendented add vi beene adada I defendants surreration '15.700.60; that on July 23. 1934 each a the said ereditors of the defendance, hackedity the plaintiff. terest to calle two the laistedcare has the two lik left-daying carrie within to additionalized 1150 at 1812 at 112000 ar OC. 3031 seeses of became stleff mich shir totale and tenies in full satisfaction of defendance' indebuckness to him; that shall ". I. Cloidt agweed to accept the sum of theol. 60 in full action beorge Triunisia only has mid of caembaidebai tainsharleb to mai mis of anamagedini 'sincheshesh to nolosiasiana List at f of 112,500.00 on before as east 1. 1934, or if paid to nair tenasgor ou. Opt; Filt to mue blue ageose of tellest e ffile . Herest thereon from Aurust 1, 1974 to the date of payment. new hime Just Date Sevena Whitifact and Just and Just Avail HyahiMis . 500.00 and 6% interest from Jurust 1st. 1934 was paid to him -airs arabe delengents would be paid and actiocanol dica refree ratio coltes the transfer affer all come provinciant and but had not fine not that their posts and not healthy was bise esw. Thisting the the plant, including the plantiff, was paid se agreed by then to be received by them in that respective claims exempt the defendants: that at no time between July 23, 1934 and August 15, 1934, the date of said alleged note which forms the basis of this suit. did the defendants or either of them receive any money or any other thing of value from the plaintiff: that the note sued upon is wholly without any good or valuable consideration: that the plaintiff. on August 15, 1934, the alleged date of the alleged execution and delivery of said note, did not part with any consideration or anything of value and that neither of the defendants received any consideration of any kind or anything of value on account of the alleged execution and delivery of said note and that no one for them or for either of them received any such consideration: that each of the foregoing statements is true in substance and in fact: that each statement is made on the personal knowledge of affiant and that if sworn as a witness in this case affiant can so testify. The instrument dated July 23, 1934, above referred to, the authenticity of which is verified by the affidavit of the defendant Fred H. Bredemeier is as follows:

"CREDITOR'S STATEMENT OF INDESTEDNESS AND AUTHORITY FOR PAYMENT.

Application No. 107679 N. F. L. A. or L. C. No. Applicant Fred Bredemeier

To Jesse B. Hayden Momence, Illinois, July 23rd, 1934 Momence, Illinois

"You hold a mortgage as an obligation of Fred Bredemeier, Momence, Iil. for \$17,000.00. Kindly state below 3,410.00

the earliest date said indebtedness can be paid, giving the amount which you will accept in full satisfaction of the same on or before said date, or thereafter, and return this statement to me.

(Signed)

Secretary-Treasurer or Loan Correspondent.

To John Krueger
Secretary-Treasurer or Loan Correspondent and to the Federal
Land Bank of St. Louis and/or
Land Bank Commissioner.

Date July 23rd, 1934

"The amount of the indebtedness referred to above is 17,000.00 as unpaid principal and \$836.03 unpaid in-3,410.00 terest up to the 16th day of June, 1934, upon which date or after which date said debt can be paid. Said

that at no time between July 23, 1934, and income 15, 1934, the .the aid to class dat core which some the class to ethic with was no voner was extension and to retrie as as as as and add the no a home oden add fund ittificials one mort outer to amid godo eds Jar's thois rediction caluable or nead thought willow the Large in all to act to ample and . 1994 . Fi James and . This are on and delivery of cital note, bid not pure with any suradministration and to believe more has mare he and draw on and resident in eacher to antimost to half the th authoral lines his lastices. Law ofon bird to emoriful has notificated Levelle out to threecders wir havingen medd the months wor to medd tel eno on tadd commission: that each of the Postonia state and the true in . betance and in fact; that each statement is adde on the personel ense aids of condity a me arrows to said but smallbe to orbeine thant can so testify. The instrument dused July 25, 1932, above fivabilitin eds to belilion at tothe To wilstonedith out to berrol-

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A THORE SHOW THE PARTY

The amount of the indebtedness referred to shows ad! -ut bisanu (836.8) bas legisate primaid bisanu se 16.000.1 indebtedness is evidenced by a mortgage due on the 1st day of March, 1944. The debt is secured by a real estate mortgage which is recorded in book 377 page 335 of the records 400 157

of Kankakee County, State of Illinois. Upon payment to the undersigned of \$12,500.00 on or before the 1st day of August, 1934, or if paid thereafter, by including interest at the rate of 6 per centum per annum on \$12,500.00 from said date to the date of payment said sum will be accepted in full

satisfaction of this claim.

"In connection with any loan or loans that may be made by the Federal Land Bank of St. Louis and/or the Land Bank Commissioner to the above-named applicant, it is further agreed that said sum may be peid in Federal Farm Mortgage Corporation bonds of the last issue preceding the date the proceeds of the loan are disbursed, fully and unconditionally guaranteed both as to principal and interest by the United States. It is understood that such bonds will be accepted in payment at their face value with any necessary adjustments for interest accrued to the date of payment. It is also understood that such bonds are issued in denominations of not less than \$100.00 and that any necessary adjustments between the amount of this claim and the nearest amount it is possible to disburse in bonds on the basis of par plus accrued interest will be paid in cash by the Bank.

"The undersigned creditor further agrees that directly or indirectly no note, mortgage or other consideration will be received from the debtor, incident to such acceptance, other than the consideration paid by The Federal Land Bank and/or the Land Bank Commissioner, and that when said consideration is paid all claims of this creditor against the above-named debtor will have been satisfied in full. No person, firm or corporation other than the undersigned is

the owner of any interest in said indebtedness.

"All papers evidencing this indebtedness, properly cancelled, and with proper release, will be delivered to the Federal Land Bank of St. Louis and/or the Land Bank Commissioner in exchange for a copy of Order for Shipment of Bonds, and a check of the Federal Land Bank of St. Louis in payment of any necessary adjustment, according to the terms stated.

"Said bonds should be shipped for delivery to and for the account of the undersigned, to Parish Bank & Trust Company, Momence, Illinois, which is hereby designated as the agent of the undersigned to accept delivery for it and

on its behalf.

(Signed) Jesse B. Hayden"

It will be noted that the amended affidavit in support of the motion to open up this judgment does not state when, where or under what circumstances the note which forms the basis of this suit was executed. Nor does the affidavit make any reference indobredness is evidenced by a morbiage due on the let day of larely 1944. The debt is secured by a real estate more-gay which is recorded in sect 377 pers 335 of the reseries 1000

of immerice learty, State of Illinois. Then payment to the undersigned of 12,500.00 on or before the let day of 12 tet. 1934, or if paid there exists the letter, by including interest at the rate of 6 per century on 112,500.00 from sail date to the date of payment said swe will be accepted in roll.

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(Migned) Jesse H. Magden"

It will be noted that the emended affidavit in support of

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to the note as having been executed by the defendants to the plaintiff as evidence of any part of their original indebtedness to him. It does not appear from anything stated in the amended affidavit that the note sued on has any connection whatever with the indebtedness referred to in the instrument of July 23, 1934 executed by appellee and directed to The Federal Land Bank and the Land Bank Commissioner. What does appear from the affidavit is that the defendants on June 16, 1934 owed the plaintiff \$20,410,00 and interest, that the plaintiff thereafter and on July 23, 1934 agreed to scale this indebtedness down to \$12,500.00 and accept this sum in full satisfaction of defendants' indebtedness to him, and that this sum of \$12,500.00 was paid to the plaintiff in accordance with that agreement. The affidavit then states that at no time between July 23, 1934, and August 15. 1934, the date of the note which forms the basis of this suit, did either of the defendants receive any consideration or anything of value from the plaintiff, nor did anyone for them or either of them receive anything or any consideration from the plaintiff on account of the execution of the note upon which the suit is brought.

In Parent Mfg. Co. v. Oil Products Co., 246 Ill. App. 222
there was a motion made to set aside a judgment by confession and
grant the defendant an opportunity to plead. The affidavit stated
that no consideration in law or in fact was given for the notes
upon which judgment had been taken and that there was an absence
of consideration and the court held the affidavit insufficient
because it did not state any facts but only conclusions of the
pleader. In the instant case there is nothing stated in the affidavit to the effect that the note sued on had any connection

the nowe as hering been executed by the defendants to the seemberdebut famigiro ticht to stag yas to comebive as thisatalq to him. It does not appear from saything stated in the smeath of nith saveinis unlicentos yas sed no bese alon add dadd divabille indebtedness referred to in the instrument of enly Rf. 1914 bur deel dari Jerabel cell ov reductib bus ecileres ye begrosse the Lend Bank Consissioner. This does regent from the afficients Tiltulate with bear ACCL , if sums as mandacated with the no ame nedirensis intraining out sadt , secretai bas 00.0 . . . tly 23, 1934 agreed to selle this tudebreak tome to 12,500.00 as a scoop this out in Fil activious of defendatat at blag car to .00.00 in our clift that the the care of the THE SERVICE OF SUSPENSE OF THE SPENSES, TO SERVICE at most be offer if the mount out of it has noted and . A, the date of the now which forms the bank of the chit. gaidiyme or the defendance was existent about to celtic Talma from the plaintiff, nor its engage for the or either of so littatain sau seus cuiversaisme ver ve juidépes evieses to the table of in Parcet Lig. Co. v. 611 inchese Co., 145 111. N.p. 122 her arterates of torontol, a ablas on un abort ordine of the sends dated alreadily and a stated by disastrates in restortal and them. man oil has reth me had at in hall of miteraligns or eith usen which introsat had been teles and that there was an absence of compideration and the court held the arritarit insufficient off he ameignforce gire and great you atoms for bis it on a -itle ont at bedate galator at seed tead that all aches wit to the affect that the note saed on had any commostion

whatever with the indebtedness referred to in the instrument dated July 23, 1934. If the note sued on did have any connection with that indebtedness it was certainly incumbent upon the defendant or one of them to set forth that fact and to set forth the circumstances under which they executed this note and how it happened to come into the hands of the plaintiff and how and why it was signed and delivered to the plaintiff, and if it had any connection with the instrument of July 23, 1934 or the indebtedness therein mentioned of the defendants to the plaintiff, those facts should appear. This was not done. The only facts that are stated are in connection with the indebtedness of the defendants to the plaintiff as set forth in the instrument of July 23, 1934. Eliminating those facts, inasmuch as they are not shown to have any connection with the execution of the note sued on, there remains nothing but conclusions of the pleader. In our opinion the trial court did not err in holding the amended affidavit insufficient.

Appellee has assigned as a cross error the action of the trial court in permitting appellants to amend their motion by filing a copy of the instrument of July 23, 1934. The court permitted this to be done upon the same day appellants' motion to open up the judgment was heard by the trial court. The record discloses, however, that the amendment was made by leave of court and under our liberal statute on amendments, the trial court did not err in permitting this amendment to be made. The orders appealed from will be affirmed.

ORDERS AFFIRMED.

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Appelles has sinkined as a cross error the astion of the trial orate in practited appollants to amend their most on by filing a copy of the instangent of July 23, 1994. The court permitted this to be done upon the same day appollants; artion to open up the july man heard by the trial court. The record discloses, however, that the enendment was made by leave of court and under our liberal statute on meadments, the trial discloses our in permitting this amendment to be made. The

PERSONAL PROPERTY.

STATE OF ILLINOIS,]
SECOND DISTRICT	J. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District	of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing	is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and thirty
	Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFINN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk 305 I.A. 485

E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On MAN the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

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IN THE

APPILIATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A.D. 1940.

RISA E. STRAWN,

Appellee,

VS.

BRADLEY POLYTECHNIC INSTITUTE, a Corporation,

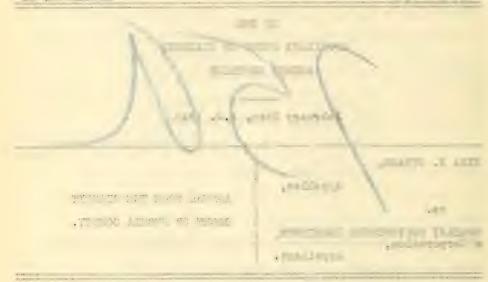
Appellant.

APPEAL FROM THE CIRCUIT COURT OF PEORIA COUNTY.

DOVE, J.

At the time of his death in July, 1936 and for several years prior thereto, George R. LacClyment was treasurer of Bradley Folytechnic Institute located in Peoria and as such ex officio business manager of the Institute and business officer and secretary of its board of trustees. By its charter and by-laws it was his duty to see that all the rules and regulations prescribed by the board for the government of the business affairs of the Institute were faithfully observed and among his other duties he was required to take the initiative in seeking investments for its funds and was responsible for the faithful execution of all contracts made with the Institute. The by-laws also provided that he should collect and receive all fees and moneys from any source due to the Institute, make a permanent record thereof and deposit the same in an appropriate bank account and was required to exercise general supervision over all acts of all officers and employees having to do with

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the receipt or disbursement of funds and securities of the Institute and to examine all claims against the Institute and no money could be drawn unless the amount had been adjusted and settled by him.

The by-laws also required him as secretary and business manager to give a bond in favor of the trustees for the faithful performance of his duties in the sum of at least 40,000.00, the premium therefor to be paid by the Institute.

On January 10, 1929 Risa E. Strawn was the owner of a small farm in Pecria County, where she and her husband lived, and on that day they executed and delivered to the Bradley Polytechnic Institute their promissory note for \$3,000.00 due five years after date with 6% interest, payable semi-annually, and secured its payment by executing a mortgage upon said premises. On February 3, 1934 Risa E. Strawn paid \$500.00 upon the principal sum and on January 14. 1935, \$37.06 was paid so that according to the records of the Institute there was due on July 24, 1935 principal and interest the sum of \$2617.31. Prior to this time Ur. MacClyment, acting for and on behalf of said Institute, made several trips to the home of Mrs. Strawn and urged her to pay the amount due and advised her that if it was not paid foreclosure proceedings would be instituted. In addition to the mortgage held by the Institute, there was a second mortgage upon the Strawn premises held by a Mrs. Blair. Mr. Mac Clyment knew of this fact and he contacted Mrs. Anna Westlake, an elderly lady, whose husband, before his death, had been a member of the faculty of the Institute. Mr. MacClyment informed her that the Institute held a small loan and that the borrower wanted more money and upon his representations to her she gave him, on July 2, 1935, her check for \$5,002.00, the check indicating that \$5000.00 was for

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be drawn unless the emount had held held end settled by him.
The by-laws also required him to servether and business conseque to give a band in ferom of the functions for the faithful confess man of his duties in the east of at least 140,000.00, the proming therefor to be paid by the Latings.

On January 10, 1929 when d. stream was the samer of a small And in the Section Course where the test to be a long or person at some and lost common at the selection will be the relative to the selection of the contract to the with white we will start will out out of the president white at marrie all topols his yellome-box offered thereast in deciding a mortrage abon said mre ises. On behru dry 3, 1934 Hisa Streem paid 9500.00 apon the pricipel and on Jeanary 11. 1935, 197.06 wer ruld to that according to the records of the Inabitate there was due on inly 14, 1935 principal and laterost MR BOR OF THE PARTY OF MICE WISH BY SET THE STANDARD STANDARD TWO To sure .. ont of agin fareved e and . alegithet I sur To the do no dans this. Mireum and upped her to pay the a war due on advised ner this. if it was not gaid foreologure proceedings would be inchivated. In addition to the mortgage hold by the Jastitute, there was a second the of the tine out of the sections with the real party of Clymont know of this fact and beneseted in . Anno . ortlaire, en Merly lady, whose instend, briero his death, has been a remoser of off tant ted board of the Tantitute . I'm .) accommon to at to attend phone from below taxonous and that the other in high which there is a property of

on his representations to her she pave like, on July 2, 1935, took for 15,002.00, the sheek indicating that (5000.00 was for

the Strawn loan and the additional \$2.00 for enother purpose. A short time thereafter Mr. MacClyment advised Mrs. Strawn that he had procured someone who was willing to lean upon her premises a sufficient amount to pay off both the first and second mortgages and requested her to meet him at his office in the Institute on July 24, 1935 and execute a new note and mortgage and that at that time the mortgages then on her property would be released. On July 24, 1935 Risa E. Strawn, accompanied by her son John E. Strawn and his wife Maude E. Strawn, went to the office of Mac Clyment in the Institute office building and while there they executed their note for \$5,025.00, payable to the order of John R. MacClyment, Trustee, said sum payable in installments the final installment falling due on July 24, 1940. To secure the payment of this note they executed their trust deed, by which they mortgaged and warranted the premises to George R. MacClyment, Trustee, and also executed and delivered to him an assignment of a certificate evidencing that Mrs. Strewn had a one-sixth interest in what was known as the Scovell and Gelke Trust. In return for these instruments, MacClyment delivered to the Strawns a release of the Blair second mortgage and in answer to their request for the release of the Institute mortgage, MacClyment stated that he was busy but that he would execute a release within the next day or so and would bring it to their home or telephone them to come in and get it. MacClyment further stated that the proceeds of the new note were more than sufficient to discharge the principal and accrued interest upon the Institute and Blair mortgages and that there would be a small amount left, which he would either pay the Strawns in call or apply it upon the interest due at the end of the first year. Shortly thereafter MacClyment delivered to Anna

. one the made of the tall has been needed a . ners the thereafter it. it olyment adviced its. Stream that seekinger werk mage mood of golffler was able ence too between had ad managarna Arress Bra turil ait ditad lin yar es sensais sa balikus a no alithic I and it relies and to min for of tod Batanarai an ded to jeft has traited and your won a stream has 1991 . the servetage them by her property with he released. An - " AL, 1935 Miss. A. utwalva, curappediate of her con Mills ... ed to tolter sit of them, where a come will all him an iti attas alidu kun tallikus selilo esuliseal edu ni s tion their note for :5.025.00, payable to fit offer of adm H. Innia 45 Education in the contract of the the the the " yell style of Living bond about his better both about the of and mazza to the provises or Course . The Nymert, to deservices we mid of betayiled for before out, but see : tenental the transfer and many and the transfer and a constitute at the constitution of at the interest of the Secret and Galle iron. It retain for oo instruments, basilyment dordressed to the Jtnewes a release . NOT Jacoby michig of genera at hos erendron Braces windle at ed fods brints from Tolera, agargers anulicum to to Tab. From add Addir seneler a equation of ou of dadd dad y at the or mode acodyclat me amed sight of it gains bloom bun so and no sheepeng and indicaters rentrant the Monte it is to a and legicals and the syllatest to discourage the twincipal and tout to appropriate and Wish mortgage and that odd to a goddo film bleas i dalain film form is flam a an b one of fearthist transfer that the light transfer from the start and

Westlake said note for \$5,025.00 and the trust deed securing the same, together with the said certificate evidencing the interest of Mrs. Strawn in the Scovell and Gelke trust. On August 6, 1935 this trust deed was filed for record and MacClyment, upon the stationery of the Bradley Polytechnic Institute wrote Mrs. Mestlake, advising her that the note which she held was a first mortgage note secured by a first lien upon the premises of Misa I. Strawn. Thereafter John E. Strawn called at the office of MacClyment several times for the purpose of prosuring the note and mortgage held by the Institute and the release of the same, but MacClyment made various excuses. On Movember 18, 1935 on the letterhead of the Institute, MacClyment wrote and delivered to John E. Strawn the following:

"BRADLEY POLYTECHNIC INSTITUTE

PEORIA, ILLINOIS

November 18th, 1935.

Office of the Business Manager.

Mrs. Risa E. Strawn, Hanna City, Illinois.

Dear Mrs. Strawn:-

My association with your mortgage matter was to assist you in the refinancing of the first and second mortgages for which your Hanna City, Ill. property was secured prior to July 24, 1935.

July 24th, 1935 a mortgage was given to me as Trustee in the amount of \$5025.00. It was payable in nire consecutive semi-ennual installments of \$125. each beginning April 24, 1936, and the remainder payable July 24, 1940. Privilege given to pay all or any portion prior to due dates. Interest at the rate of 5½% per annum, payable semi-annually, the first installment being due Jan. 24, 1936.

swid mote for [5,625.00 and the trust lead scenting the same, tegether with the maid certificate eviat. the intersort of Mrs. Starm in the Acovall and Colic trust. On Angust 5, 1919 this trust dead was filed for record and Jacobara, upon the statement of the Dradler for record and Jacobara, upon the attributing of the Dradler for the Hellows and the cole is. Invilate, edwing her that the note which the belief are a first lies upon the premises of six in the cole. Thereselve John K. Struck. Therefore John K. Struck easied by a first lies upon the premises of six in the first and the first the solid at the safety of the solid and the first and the first trute and the release of the solid and the least of the following of the solid and the first and the first and and delivered to John a therm the

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It nessential medition with your mirtgryn nitter was to seeist you in the relinateding of the rint and second mortgages for which your limits City. Ill. property was secured prior to July 34, 1935.

 The security is the home property at Hanna City and the assigned trust certificate for the one-sixth-interest in the 263 acres of Iowa land. The Trustee to pay direct to me for your account, dividends from the Iowa land. This we hoped to be sufficient for interest and principal payments.

The \$5025.00 mortgage was given to first repay the second mortgage of Mrs. Blair, which was surely pressing at that time. Also taxes and loan expense. As early as convenient for funds, the Bradley loan in the amount of \$2500 to be repaid, and the \$5025 mortgage to then become a first and only mortgage, secured by property stated, and payable under conditions set out. The \$2500. loan to Bradley to be payable from funds to be received under the \$5025 mortgage under date of July 24th last. And your responsibility for the Fradley loan ceased both as to interest and principal as of July 24, 1935, and your sole responsibility is under the \$5025 mortgage bearing interest at 5½ per annum and payable as stated.

We have hoped that the matter could be entirely completed before this. All taxes, insurance premiums, abstracting and recording and loan expense, and interest account Bradley loan were cared for at the same time as the mortgage to Mrs. Blair was paid. The latter was cancelled, released and the cancelled papers returned to you.

Very truly yours,

G. R. MacClyment "

On September 10, 1937 Risa 1. Strawn filed the instant complaint in the circuit court of Feoria County making the Institute a party defendant and praying for an order directing it to deliver to the plaintiff and the note and mortgage which it held and that it be decreed to release the mortgage of record. By its amended answer the Institute stated that prior to July 24, 1935 George R. MacClyment ascertained from the plaintiff that she required a mortgage loan to refinance the property upon which the Institute had a mortgage, that MacClyment informed her that he could secure the money for her, that he did so secure it from Anna Westlake and

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in exchange for the sum of \$5025.00 MacClyment delivered the Strawm note of \$5025.00 and the trust deed securing the same to Anna Westlake, that MacClyment did not pay the Institute the amount due it from the proceeds of the loan made by Mrs. Strawn, and that it connot ascertain what he did with the amount Mac Clyment received which was due the Institute upon its note and mortgage. Upon the motion of the Institute Anna Lestlake was made a party defendant and the Institute filed a cross-complaint against her in which it alleged that George A. MacClyment was the agent of Anna destlake for the purpose of investing for her the sam of \$5025.00. that Anna Westlake delivered to him said amount and she instructed him to procure for her a first mortgage lien upon the premises involved in this proceeding, that contrary to her instructions MacClyment did not apply any portion of the money received from Anna Westlake in payment of the mortgage indebtedness to the Institute. The prayer of the crosscomplaint was that a decree be entered finding that MacClyment, at the time of the transactions, was acting for and as agent of Anna Westlake and that the mortgage held by her be decreed to be inferior and subordinate to the lien of the mortgage held by the Institute.

In her answer to the cross-complaint Anna Westlake denied that MacClyment was the agent of Risa 1. Strawn but avers that he was the general agent of the Institute in loaning its money and collecting principal and interest due it. She alleged that she gave MacClyment 5025.00 for the purpose of satisfying the Strawn mortgages, which were held by the Institute and by Mrs. Blair and she charged that MacClyment received the money from her as the authorized agent of the Institute and that payment to

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him operated as a payment of the Strawn note and mortgage which the Institute held. After the issues were made up the cause was referred to the Master, who took the evidence and reported the same, together with his conclusions, to the chancellor. The master found that in this transaction Waschyment was acting as sole business manager of the Institute, that in procuring the sum of \$5025.00 from Anna Westlake, MacChyment was to pay the Strawn inacetedness to the Institute and that said indebtedness was in fact paid to MacChyment and its payment to him operated as a discharge of the Strawn mortgage. The chancellor, after overruling exceptions to this report, entered a decree in conformity therewith dismissing the cross-complaint for want of equity and granting the prayer of the criginal complaint. From that decree Bradley Polytechnic Institute appeals.

In our opinion the evidence sustains the finding of the master and supports the decree. George R. MadClyment was the only person authorized to receive payment of the indebtedness due from Mrs. Strawn to appellant. The evidence is that he made several trips to see Mrs. Strawn about paying this obligation after it beceme due on January 10, 1934. He told her he knew where an amount sufficient to pay off appellant and the amount due on the second mortgage to Mrs. Blair could be obtained. On July 2, 1935 he obtained this amount for these specific purposes from Mrs. Westlake and thereafter on July 24, 1935 in compliance with his request Mrs. Strawn came to his office at the Institute and executed the new note for \$5025.00 and the trust deed securing it, together with an assignment of the trust certificate, that thereupon MacClyment delivered to Mrs. Strawn the release of the Blair mortgage but did not give her a release for the mortgage held by appellant,

his operation of a payment of the Circhera bote and the tends which the lestives held. Takes has been seen and any the cause was referred to the Carle States, the third operate the same, together with his conclusions, to the camestice. The same the found that in this transaction "worly was noting as role beathous members of the Chartisola, that in grounding was and of 47035. It from that lesting, that in grounding whe sam of 47035. I from that lesting, that is all independent was in fact the cand that and the payment to the convents as the case of the Stream northings. The simulation, after over-a licebard as seen of the same of conformity and water is seen the conformity and the limitesing was cross-complaint for mant of equity and therewith limitesing was cross-complaint for mant of equity and

In our opinion the evidence restrict the finite of the master and carpents the decree. Scorpe R. Methyment was the clip person Strows to appairing. The evidence is thing the matter it thing the case the content to see the Course and the children after it seems the season of the course of the season of the course of the season of the course of the course of the case of the case of the case of the course of the case of the c

although he had previously received from Mrs. Westlake the amount represented by the note and mortgage which appellant held. From all the evidence it is apparent that MacClyment was acting in his capacity as agent and business manager of appellant when he received the money from Mrs. Westlake for the specific purpose of discharging appellant's mortgage and payment to him, in equity, operated as a payment to appellant and discharged the indebtedness due appellant upon the Strawn note and mortgage. When, on July 24, 1935, MacClyment refused to deliver to lirs. Strawn the release of the mortgage held by appellant, he had previously received from irs. Westlake full payment thereof. In bringing about this payment he was acting as appellant's representative. (acclyment by his negotiations as agent for appellant procured from Mrs. Westlake a sum of money sufficient to satisfy the Strawn mortgage which appellant held. Appellant does not contend that MacClyment was the agent of Mrs. Strewn but insist that the evidence discloses that what he agreed to do was to arrange for the refinancing of her loan to appellant. What the ovidence discloses is that MacClyment advised Mrs. Westlake that appellant held a nortgage on Mrs. Strawm's property, that there was a junior lien thereon held by another party, that they aggregated approximately \$5,000.00, that if she would give him that enount he would pay off those liens and procure a note secured by a first lien upon the Strawn property for her. Upon these representations Trs. Westlake gave him \$5,000.00 for those express purposes and this money came into his hands as the only person authorized by the by-laws of appellant to receive it. Counsel for appellant argue, however, that inasmuch as MacClyment did not pay the amount due appellant upon the Strawn indebtedness but converted it to his own use, the only reasonable conclusion

edt chaldeed and poet besteers yleustverg bad ed groot inallegge deims energined and one of the decreas. decomplosed that smeanges at it somebive out the work . be eting in his caracity as them business mangers of ent when he resulted this meant from . Gra. . estlate tor the the second of the second state of the second s ling, is equity, operated as a payment to appellant and disher even may belt not usalises due assisteini eis be ortgage. Moon, on July 24, 1935, MacConna refused to deliver ing, straus the release of who westers held by suspillent. -ovens drawar little satistics. . . or more bed over the private bod a lineliseca as nation as we are seemed this sould pright of . . roi duora on anoidaide en aid ed dasa (Coal) . trainifilms genera to hure a orbideel .ach work becoment in Desired Aller Stellers daths response course and Tourists and contend that decrease was the course of the dear of bearge of fails this resolve is somblive end this to to was to erremne for the refinement of her lose to ensellent. ing time eridence dicolores is that ligetlywork savised its. laire thire a pellunt hald a mortgage on ist. Livewe's property. there was a junior lies thereon held by another party, that ovin birer ent li dent .00.000.20 violentroage 5 stea a prupera bar anell secul ito you block ad the of by a first line upon the Sareun property for her. ementations are leaviste gave him (5,000.00 for those ses and this money came into his hands as the only *ar natemen on answering to chorach a the description of the state of the second as successive the second of t due supellant woon the Strawn indebtedness on north is own use, the only respondble conclusion

that can be drawn from the admitted facts is that he continued to hold this money as the agent of Mrs. Westlake and that the result of the entire transaction was that the Strawn mortgage to appellant remeined a first lien and that lies. Lestlaxe's mortgage is inferior to its lien. We do not think so. There came into MacClyment's hands as agent of appellant money furnished by Mrs. Westlake for the express purpose of satisfying the Strawa mortgage which appellant held. The receipt by MacClyment of this amount was in fact payment to appellant and operated, in equity, to discharge the lien thereof. MacClyment so stated in his letter to Mrs. Strawn of November 18, 1935 hereinbefore referred to. Furthermore some time later Ross S. Wallace, president of appellant, stated to John J. Strawn that he had seen a copy of this letter and then advised Strawn that some of MacClyment's affairs were not in proper order but for Mr. Strawn to go home and not to worry. Mr. Strawn testified that Mr. Wallace also said to him upon this occasion: "You will not have any interest or principal to pay, don't give it any worry".

The evidence is further that the books of appellant relative to the Strawn loan were under the suprevision and control of Mac Clysent and they disclose that on September 5, 1935 MacJlyment credited the Strawn nortgage with \$124.31, which reduced the principal sun due to \$2500.00, that on the same day the books show an interest payment of \$76.20 and on January 22, 1936 a further credit is shown of \$76.10 interest due January 10, 1936. These last entries were made by MacJlyment so that the records of appellant would disclose that this loan was in good standing. There was also introduced in evidence a statement in the handwriting of MacJlyment showing the Westlake and Strawn transaction. The amount

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he received from Mrs. Westlake appears thereon, together with the amount he paid to procure the release of the Blair mortgage, together with various other items such as abstract expenses, taxes, recording and the items credited to the Strawn account on appellant's books for interest and the balance as shown by the books of appellant just referred to.

The decree is sustained by the evidence and will therefore be affirmed.

DECREE AFFIRMED.

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STATE OF ILLINOIS, SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the	State of Illinois, and the keeper of the Records and Seal thereof, do hereby
	rue copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and thirty
	Clerk of the Appellate Court
(73947)	,



1530

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFIAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

BE IT REMEBERED, that afterwards, to-wit: On MAY 1 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

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A LILI COURT OF BLLINOIS

SECOND JESTRICT

February Term, A. J. 1940.

JAMES J. McCAULLY, Administrator etc.,

appellee;

V.

APPEAL FROM THE CIRCUIT COURT OF MCHENRY COURTY.

AUGUSTA PETERS, et al (Walter Haertel, Appellant)

DOVE, J.

On March 15th, 1939 James J. McCauley, Administrator de bonis non with the fill Annexed of the Estate of Charles Peters, deceased, filed his petition in the County Court of McHenry County to sell the real estate of his testate to pay the debts of said decedent. A hearing was had, resulting in a decree directing the administrator to proceed to advertise and sell said real estate as provided by law. To reverse this decree Calter Enertal, one of the defendants, appealed to the Supreme Court of this State, which transferred the cause to this court.

From the record it appears that Charles Peters, a resident of the Village of Huntley, died on November 23, 1939, testate, leaving Augusta Peters, his widow, and an adult daughter, Caroline Peters Webster, his only heirs and devisees. By the provisions of his will he bequeathed and devised his property to his daughter subject to the life estate of his widow. On December 23, 1929 this will was duly admitted to probate and letters testamentary issued to his widow.



in March 19th, 1979 Johns J. Noderley, Administrator he bonis on with the Aill Anamed or the sette of Charle, Neters, Georgesk, filed his protein in the Consty Court of selency House, to nell the take of his protein of the Selency House, to nell the take of his to select the selection in a decree strenging the semistrator to edverting and sell mais rest astack on a parelised by law.

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en The record it appears bien themshes Febers, a mesident of a cf familey, died on Hoverbey 1), 1989, testate, leaving , this pidow, and an adult damenter, Caroline Febera all pairs and devisors. By the provisions of his will an devised the construction of the construction to the construction and devised to the

The following March Term of the Probate Court was fixed for the adjustment of claims and publication duly made thereof and an order entered by the County Court determining heirship and appointing appraisers as provided by law. On June 6, 1931 E. H. Cook filed his claim for funeral expenses and this claim was allowed and judgment readered in his favor for 1324.25 on November 26, 1934. Nothing further appears to have been done toward the setule ent of the estate until April 8, 1936 when Mrs. Peters, as executrix, filed her inventory which disclosed that her husband left no personal property of any kind or character but owned the dwelling in the Village of Muntley, which was occupied by himself and wife at the time of his death and according to the inventory worth (1500.00. This inventory was duly approved. On December 28, 1936 the said Edward H. Cook filed his petition setting forth that he was a jud neat creditor of said estate and interested in its administration and that Augusta Peters was both physically and mentally incapable of continuing her duties as executrix and praying for her removal. Upon a hearing an order was entered removing her and James J. McCauley was duly appointed administrator de bonis non with the ill Amunaed of the ostate of Charles Paters, deceased. Thereafter the supraisers, appointed on December 23, 1929, filed their report fixing the amount of the widow's award at \$600.00, which was duly approved and an order entered finding the condition of the estate. By this order it appeared that the liabilities consisted of said widow's award of \$600.00, claims allowed amounting to \$354.25 and costs due and to accrue amounting to \$275.00, all of which aggregated \$1229.25 and that there were no assets in the hands of the administrator. Thereupon the instant verified petition to sell real estate to pay debts was filed by said McCauley as administrator. The petition

the full state that the course of the same party and the full state of the last ogo na bas tourció shop glub suliabildes bas amislo to desa 1 by the Con. by Court determinist beingule in appointing raisors at provided by Lat. On Jun. 5, 1732 '. i. Ocon filled -rBut has benefit new rists sind be: asser one intensit tol minds and t roudence in the favor for JEA. 25 to Movement to 1914. Hoteling stands only to one minist and hamed and here each of the epitate SHIP BUILD AND ONE OF THE OWNER, IN COLUMN THE OWN THE OWN THE wanterst landster or first eredamt fun ar Al Localbalb seine ga to as the sat at the cold bean the sate of the terms of the cold a lor, which were accupied by mincelf cal vive so bee thre of the - the 'e accepting to the inventory count 1903.50. This inventory and the common but the control of th traditione from the a sea of file force pulties maidifer siz ntop mi sadi kum rottardililaba eti mi boscensal bu, esado dine 🔧 the simple of the second control in Citable in the law Parks so as om outiful and perplay for our energy. From a saning an This for golumber, is some a bout out ; nivored beroten and to and to bekenne ifil out dail to a shoot we noten inch bother ate of Charles follows, december Theoseaker the equality, apthe many and the first state of all the term of the section of the ELECTION OF THE PROPERTY OF TH rest: with the .o. of the cataton of the catato. By this ersor Strum a'webis bine to be saissee establishis wit tent b See at action to the territory of the second second to the TRACTURE Description of the control of the second of the control o .Tôjara wara no danah dik dik dinab bu wara parah arah var of administration and interest of the contract and

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recited the foregoing facts and further alleged that since the death of Charles Peters the real estate had been rented for \$20.00 per month, which rents had been collected by the Evangelical Lutheran Old Folks Mome of Chicago. It was further alleged that the taxes had not been paid and that the taxes and penalties upon the property amounted to \$380.09 and that the property had been forfeited to the State of Illinois for non-payment of taxes. Appellant was made a party defendant to this proceeding and on June 5, 1939 filed the following unverified answer: "Now comes the defendant by Marcus J. Sternberg, his attorney, and denies each and every allegation set forth in the action brought by the plaintiff herein and calls for strict proof. He denies the right of the plaintiff to recover upon said action so brought by him herein".

The record discloses that upon the hearing counsel for appellant objected to the court proceeding to render a decree or entertaining the proceeding on the ground that seven years had clapsed after the death of Charles Peters before the petition to sell real estate was filed and objected to the introduction in evidence of the apprecisers' estimate of the amount of the widow's award and the a provid thereof by the court. These objections were overrulal and the cause proceeded to a decree and it was stipulated by counsel for the purpose of making up the record on appeal that the several potitions and orders herein referred to should be made a part of the record on appeal, together with a copy of the record of an assignment by Augusta Feters executed December 15, 1938 by the provisions of which she assigned to the Evangelies Latheran Old Tolks Home Association of Chicago all the rights which she might have in the estate of Charles Peters as his surviving widow, heir, legatee or devisee. The decree, in addition to finding this fact, also found that the daughter, Mrs. 'abster, had

ade eachs dould logally roller out further that at see a se thing it was manner could bed another first and a greatly not your to desired merceliat Indicagnet edityd betselloo med bei staer delda ; dicar rewith the a of distance. It was tarting alleged that the tense with green and groups a lither's and section in the contract on their ed of balletter and had arecorded this for 10.001, or barraces e of regarding the company of the company of all the company of th eit in lin Pag. , Trass er tens andeason sint or foller tal . Lardrey marritled encutors View comes the deference by bernes I: des note gelle evice à la cata e dans di servici i well aline born when i this while is the training of the could be and ali and recovered this interest to the contract to decide the contract and a Company and the American Street Company of the Comp tacking our times make all partial present beauty agial-dudme no secondo a crimar et pallocare, ducco está es h er't gitt bestict bis er meg neven did limeer en ee ee and control from Aich of Archest and account of the and account for Alech Interior to the well be constitute as another this end of businessed has bellik athers, and all in different being and hear with a street with a . icoras esi it was svipulated ar. especal for the curros of galden skered suctra for analthing femores odd field finada na fraces od d to minuid be made a part of but record on const, tempeling of the record of as ancies by Assach Peters . Torbed self of his box of milds to publishing all at MM place end ils epecial to medical contents for the second of this end this sith the factor of the estate and in the same at his and the state of the second state of the secon the Audin this draw can been that the beautiful the bridge had conveyed her interest in the premises to her mother end had also conveyed to her mother all her distributive share in the estate of Charles Peters, decessed, and further that on April 6, 1932, Emos Connley had obtained a judgment against augusta Peters in the amount of \$319.13 in the Circuit Court of McMonry County and that an July 25, 1932 the State Bank of Muntley had also obtained a judgment against her in said court for 226.11 and that on July 27th, 1934 Walter Haertel, appellant hereia, had obtained a judgment in said court against the said Augusta Peters for \$192.00. The decree further found that the said S. N. Cook had filed a claim against said estate for the funeral expenses of the deceased and that his claim therefor had been duly allowed by the executrix and that Dr. Oliver I. Stoller had filed his claim against said estate for professional services rendered the deceased during his last illness and that said claim had been duly allowed on March 10th, 1937.

Counsel for appellant argue that this petition was based in part upon a widow's award which was allowed more than seven years after the death of the testator and that the decree is therefore erroneous.

The law is that while there is no statute of limitations barring proceedings by administrators for the sale of land to pay debts, yet the right to sell the real estate of a deceased person for such purposes will be barred after the lapse of seven years unless the delay can be satisfactorily explained and in this respect each case must rest upon its own peculiar facts. Harlbut v. Talbot, 273 Ill. 299. It appears from this record that the only property which Charles Peters owned at the time of his death was the property which this decree orders sold. At the time of his death on November 23,

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1929 he and his wife were occupying the same as their homesteal. His will was admitted to probate and on December 23, 1929 his willow was appointed executrix of his estate. She fixed a day for the adjustment of claims, made publication to that offect and the court appointed appraisers. On November 26, 1934 the claim of Edward II. Cook for funeral expenses was allowed by the County Court and thereafter the executrin filed an inventory. On December 23, 1935, which was seven years and five days after the executrin was appointed, Edward E. Cook as a judgment creditor filed his petition to have the executrix removed, alleging her physical and serval incaregity, When she became mentally and physically incapacitated does not excear, but she was removed and the present administrator with the will annexed was appointed to complete the soutlement of her estate and the supraisers appointed by the court in 1929 fixed the amount of the widow's award and this was approved by the court and this award, together with the allowed claims for funeral expenses and for physician's services rendered the deceased in his last illness form the basis for the present proceeding. The facus in all of the cases cited and relied upon by counsel for appellant are easily distinguishable form the facts as disclosed by this record. When this property ceased to be the homestead of the surviving widow of Charles Peters does not appear and in our opinion the court in the instant case rendered the only decree that was warranted under the authorities. The delay of the executrix Augusta Feters in settling this estate and having an award set off to her cannot prevent the present petitioner, who is the administrator de bonis non with the will annexed, from proceeding to subject the real estate of the deceased to the payment of the allowed claims against his estate.

Continued their art test and different new right and his section, MATERIAL CONTRACTOR OF THE PROPERTY OF THE PRO and got the activity . At the continue a derivative and the the the thirt of claims, name publication to that effect and bas count od aggreisses. 'n Povember 2s, 1984 the claim of Dimers L. -a rate for burns or such edit ye towalls are searouse formul to? er the execution filed on inventory, in measure DA, 1816, which was years and rive days are the exceedence and received, of E. don as a journeys encliner false of a joiltier or leave the which person is allegand but paper and palegalis terment throws . The pure that made introducting factoring and pilotton ended ear Acronne file and dela reserva lairde factore und las devenes any aris dearealering and him colder are to demail be a size of bilalogo. Down here a furtire and we learned and hemit then all the and we have ear and this was experienced by the sound and thing a training care aim and the applyers at maintain that the contract and the interest and the contract a wit get timed the tend is a little of the banke of the barde for the process wrocealtar. The Facut is all of the came sites emi rolled when by someral are organisand are easily distinctionable two, two forts as disclosed by this record. Then this accest, secred to be the honeseed of the aurviving vides of Charles Frieze does not off Levelner case shapeth and in three out marrier and hi has use To take and take with which the color of the dalage the The maintenance is a settle while opinions at a rever party and returned only al act at the beauty state prevent the product bottlener, was at adding trates as bomin not with the will suremed, trem proceeding and he drawing out to weesal and he esses has see see soon . Description of the carrier of the complete The statute under which this proceeding is had provides that the practice in such cases shall be the same as in Chancery. The question of laches in the allowance by the court of the widow's award or laches in filius the instant petition was not raised by any pleading filed by appellant and is therefore not available to appellant. Hirsh v. Arnold, 318 III. 28: Elting v. First Nat'l. Bank, 173 III. 368.

The decree will be affirmed.

DECRUE APPIRING.

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STATE OF ILLINOIS,	SS.
SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of	the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing i	s a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and thirty
	Clerk of the Annellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAIME HUFFIMM, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

305 I.A. 486

BE IT REMEBERED, that afterwards, to-wit: On MAY 15 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

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IN THE APPULLATE COURT OF ILLINOIS, SECOND DISTRICT,

PERCUARY TERM, A.D. 1940.

PARSONS LUMBUR COMPANY, INC.,
a Corporation,

Appellee.

PARSONS LUMBUR COMPANY, INC.,
a Corporation,

Minnebago County.

Appellee,

V2.

Appellant.

HUFFMAN - J.

The Parsons Lumber Company was incorporated about 1922. Hugh G. Farsons became President of the company and continued in such capacity until the close of 1931. After his services had been severed as President and manager of the corporation, he brought suit against the company for 1951.20 for back salery. The company filed answer and counterclaim in that suit. Parsons filed replies to the answer and counterclaim. While that suit was pending, the corporation filed its complaint in chancery against Parsons for an accounting with respect to certain items of expenditures of the company's funds. The trial court consolidated the law case with the chancery action.

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It appears by the allegations in the bill for accounting, that between January 1, 1927, and December 31, 1931, Parsons had expended \$18,985.83 of the company's money, which expenditure was grouped under three headings, designated as "expense account," "travelling expense," and "Auto expense." It was alleged that none of these expense accounts disclosed for what purpose the money was used, and it was charged that he had used the sens for properly purposes; that such expenditures were not all bona fide and made in connection with the business of the company. The complaint for accounting prayed for discovery as to the actual use and purpose for which the money was expended; that an accounting be had in order to determine what sums were improperly expended, and that upon such an accounting, a decree might be extered finding the amount which should be returned to the plaintiff corporation by Parsons.

Parsons filed answer to the complaint for accounting, admitting that he had been President as charged; denying that he had made the alleged expenditures of the company's money without the knowledge and consent of the directors and stockholders; denying that his reports of such expenditures were made so as to conceal the true nature thereof and the purpose for which the same were used; alleging that all of the expenditures were for the benefit of the corporation, made with the knowledge and consent of its Board of Directors and the stockholders thereof, and approved by them at each annual meeting, to and including December 31, 1931. The defendant Parsons denied all charges of misconduct with respect to the use of the company's money and denied its right to an accounting.

On June 26, 1936, the then sitting Judge of the circuit court of Winnebago county, entered a decree for accounting, wherein many

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on county, converse a course for evaluating, almost a many

findings of fact were incorporated. By that decree the court found that Parsons had been fully paid his salary up to the time his services with the corporation were terminated and that he had no salary due him, and that in fact he had overdrawn his salary in the sum of \$300. The decree then found that certain expenditures were made by Parsons of the company's money, which corresponded to the tabulation of same as set out in the complaint for accounting; that Parsons had failed to itemize such expanditures and that there was nothing to show for what purpose the money was used, other than the general designation of general expense, travelling expense, and automobile expense, as above mentioned. The court decreed that the company was entitled to an accounting from Parsons with respect to the expense items of \$18,988.83, and that he should return to the corporation such portion of said expense money as should be found to have been improperly expended, and ordered an accounting taken to determine such amount. The court then decreed that the total sum of 119.288.83 (being comprised of the two items of 18,988.83, expenses, and 300, salary), should be the subject of the accounting; that the company was entitled to a decree for said amount against Parsons, subject to change by the further order of the court upon the report of the Master in Chancery to whom the cause was referred to take the accounting.

The Master proceeded to take the accounting. He found by his report that Parsons owed the corporation the sum of \$554.83. The company filed objections to the Master's report. Parsons filed objections thereto. All objections to the report were overruled by the Master, and were permitted to stand as exceptions thereto in the trial court. The Master's report was filed January 14, 1937.

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Following the entry of the decree of June 26, 1936, ordering the accounting as to the fund in question, there was a succession to the jurisdiction, the Judge granting the decree for accounting having died. On July 27, 1939, the circuit court of said county, in making disposition of this cause, entered a decree wherein it is recited that the court was uncertain as to whether or not the decree of June 26, 1936, was a final decree, but wherein the same was treated as a final decree, and binding upon the parties and upon the court, in adjudicating and determining that Aursons was indebted to the corporation in the aggregate mount of 19,238.33. The court by the present decree finds that it has no newer to charge or amend the decree of June 26, 1936; that it was final as an adjudication of the matters in controversy between the parties and of their rights relative to the subject matter of the litigation. All exceptions to the Master's report were decided on the ground that the decree for accounting entered June 26, 1936, was final and binding on the parties.

It is maintained on the part of appellee corporation that the decree of June 26, 1936, was final and determined the rights between the parties, and gave judgment against Parsons in the sw. of \$19,288.83.

It is maintained by appellant that such is not the situation, that otherwise, there would have been no object to granting an accounting; that a decree is not complete which requires further judicial action on the part of the court to give it effect and to grant the relief sought; that this was an action for an accounting; that the right to the accounting was denied and the amount involved, in dispute; that under such circumstances, the right to the accounting was a question to be first determined by the court; that such finding was interlocutory in its nature; that the amount for which

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It is mainteined by sepalant that such is not the situation, a otherwise, there would have been no object to grathan an ruting; that a desied is not complete which negation for the part to the sourt to the sourt to the state it effect and to the relief desire, that the was an action for an ecocunting; a right to the accounting was an intercept to that determined by the court; that another another was interlocutory in its nature; that the court for which

Parsons might be liable was not then fixed and determined by such decree, but that the decree merely set out the particular fund for which the accounting was to be had; and that a final judgment could not be rendered in the case until after the Master had taken the accounting.

It is thus apparent that the disposition of this appeal depends upon whether the decree of June 26, 1936, is to be considered as a final decree, or as interlocutory in character.

It appeared from the allegations of the complaint for accounting, that the character thereof was complicated and extended, and involved many transactions extending over a period of five years. The decree transition the prayer for accounting as proper. Instrict of the corporation to the accounting was decied by Persons. There the liability to account is decied, there must be an interlocutory decree finding such liability before there can be a reference to a Master. The decree in this case directed the Master as to what items the account should extend. This was proper, as such directions included only the items that were in dispute.

Sometimes the accounting is the main relief sought. In other instances, it is only ancillary to other relief crieted, and in such cases the decree by which the accounting is cranted, may be final with respect to rights of the parties which must first be determined before an accounting would be in order. Here, the items constituting the subject of the accounting, were in sharp dispute as between the parties and nothing appeared in the pleadings at the time of the decree of June 26, 1936, to indicate in what manner or for what purpose the money was used. That was the sole question to be determined upon the evidence introduced before the Master upon the hearing. Neither party was in position at the time of the decree of

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June 26, 1936, to say that such decree was final as to the amount of money for which Parsons should be held liable to the corporation. An appeal from that decree would have settled nothing, as no court could pass upon the questions involved until the accounting had been taken and the evidence presented as to the nature of such expenditures and the purposes for which they were made. It was the determination of this that necessitated the accounting, and it was the necessity of the accounting which made the decree of June 26, 1936, interlocutory. No rights of the parties appear to exist, except such as were incident to the accounting itself.

Appeals should not be taken piecemeal. As stated in The People v. Stony Island Savings Bank, 355 Ill. 401, at p. 403, "A decree is appealable only when it terminates the littration between all of the parties on the merits, and whom, if aftirmed, the court which rendered it has only to proceed with its execution." And further, at p. 404, "But if a decree provides, that jurisdiction be retained for the future determination of matters of substantial controversy between the parties, it is not final." There is no question in this case but that the decree retrined jurisdiction for the future desermination of how much, if anything, Parsons was to be held liable for, to the corporation. This was the sole controversy between the parties and hence it is evident that the decree of June 25, 1930, was not a final decree. Since the decree of July 27, 1939, from which this appeal is taken, treats the decree of June 26, 1936, as being final and conclusive between the parties, it is erroncous. The authorities referred to in the above case, and in Smith v. Bunge, 358 Ill. 229, are illustrative of, and conclusive, with respect to the above questions.

As we view the decree of June 26, 1936, in the event an appeal had been taken therefrom and effirmed, there would have been nothing

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the trial court could have done toward proceeding with the decree, until after the accounting had been taken and report of the laster filed. The fact that the court by the former decree held that appellant company was entitled to have an accounting as to certain items of expense charged by Parsons, did not produce a situation where it can be said, that it followed as a matter of law, that anything was due and owing by Parsons, to the corporation. The reference to the inster was made for the purpose of determining this question. Thus we find that natters of substantial controvers in issue between the parties, were not determined by the decree of June 26, 1936, and could only be determined upon the accounting. This is manifest from the decree itself, as it reserves jurisdiction of the case, pending the outcome of the hearing before the Master. Therefore, we do not consider the reference in this case to have been an execution of the decree, but only preparatory to the rendition of a final decree.

The decree of July 27, 1939, from which this appeal is prosecuted, is reversed and the cause romanded with direction that the trial court proceed to consider the exceptions as filed to the Master's report, following which, a final decree shall be rendered.

Reversed and remanded with directions.

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STATE OF ILLINOIS.	
STATE OF ILLINOIS, SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
SECOND DISTRICT	1, JUSTUS L. JOHNSON, CIERK OF the Appenate Court, in and
for said Second District of the	State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a tr	rue copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and thirty

(73947)

Clerk of the Appellate Court



40438

SORPERATION.

Appellant,

W.

GUS VAN HECK, CHICAGO FLAT JANITOR'S UNION LOCAL NO. 1, JOHNTO MATERIA. Appellees. ASPEAL FROM

SUPERIOR COURT.

COCK COUNTY.

05 I.A. 486

MR. PRESIDING JUSTICE MATCHETT DYLIVERED THE OPINION OF THE GODAY.

This appeal is pending on rehearing granted on setition of the plaintiff. The action in the trial court was in shancery for an injunction to restrain defendants from maintaining giokets at plaintiff's presises. The bill charged the sicketing was with inticidation, threats and violence. A preliminary injunction leaved as prayed. The defendants unswered admitting the maintenance of the pickets but denying threats, intimidation or violence and claiming under the Anti-Injunction Statute (Ill. State Mar State., enap. 48. \$1, par. 2a, p. 1549-1550; Laws of 1986, p. 376, Initi-nurs lane. Stats., chap. 48, par. 2a, p. 158), the picketing was lawful. The cause was referred to a Master, who took the evidence and reported. finding the averments of the answer sustained, recommending the dissolution of the injunction and displaced of the assumed bill. Objections by plaintiff before the Waster upon the hearing before the Chancellor stood as exceptions, were overruled by waster and Chancellor and a decree entered as recommended. Flaintiff appeals.

Section 1 of the Anti-Injunction Act provides:

any court of this state, or by a judge or the judges thereof in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor, or from peaceably and without threats or intimidation recommending, advising, or persuading others so to do; or from peaceably and without threats or intimidation being upon any public street, or thoroughfare or highway for the purpose of obtaining or communicating information, or



MR. PRESIDER STEFFER STATES SATURATE STATES FOR A CHICK THE OLD TO

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to peaceably and without threats or intimidation persons or persons to work or to abstrain from working, or to employ or to peaceably and without threats or intimidation cease to employ any party to a labor dispute, or to recommend, advise, or persuade others so to do. "

The evidence shows the plaintiff corporation. They were not prospective applicants for employment, but were newbers of the defendant union and for many years had not rendered service as janitors. They testified, denying threats, intimidation or force, and the Master found these unlawful methods had not been used. They admit that in so far as possible a "secondary boycott" was established against plaintiff in attempting to induce the repair man, the coal man, the milkman, the gardage man, the laundry man, etc. to cease performing their usual services for plaintiff and its tenants. One of the pickets occupied the alley in the rear of the building; another the street in front of it intercepting persons furnishing services, goods, etc. to plaintiff and its tenants, and in so far as possible persuaded them to refrain from doing so.

The building consisted of 37 one-room furnished apartments in which about 75 persons lived. It was a three-story brick with English basement. Plaintiff rented the apartments furnished. There was one store in the basement. These pickets were placed at plaintiff's premises on July 30, 1937. There was no dispute between plaintiff and any of its employees concerning terms or conditions of employment at that time or since. Anton Easlukas, a member of the defendant Flat Janitor's Union, was then employed as a junitor. continued to serve until March 17, 1956, when he was discharged by plaintiff after notice. The janitor work to be done at the building did not require the full time of a janitor. Easlukus served and was paid on the basis of part time service. He received compensation of .75 per month. So far as the evidence shows, he did not at any time complain as to the wages paid or the conditions under which he worked. We testified, however, that the manager of the building asked his to render certain kinds of service which he told the manager was against

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to perceptly and eliment threats or intlativitation meremain may person or persons to vouk or to abetsin from vertile, or to employ on to my menty to an eliment threats or invincion comes to employ any marty to a labor dispute, or to recommend, edvise, or persuada others or to do to do to do to do to the commend.

The evidence shows the pickets, Robert Toler and Joseph Nurse, were not employers of the pickets corporation. They serve not prospective explicants for employers, but were nowhere of the defendant union and for mean years had not rendered service as jouriters. They testified, fearing threats, intimination or force, and the saster found these animalial sections into not have used. They admit that in so far as possible a "escendary horsest" was established against plaintist in assembling to induce the repair man, the conlinent, the garbage was, the laundry man, etc. to come sentencing that we allege was, the laundry man, etc. to come of the pickets occupied the alley in the rear of the indicion; and the street in front of it intercepting persons furnishing markets, and in so far as mandals. The presential than to retrain front doing so.

allegation and the state of the salar and the salar and all in which shout VS persons lived. It was a three-story brisk with stated inclinate efficiency and definer Thinlast, descend dalligate - als fire heart in the heart. These planets were planet in the tidi's president on July 20, 2007, there use he signife behous plainfiff and any of its employees concerning terms or conditions of amplegment at that time or cises. Acton Lacintae, a member of the defondant flat dani ter's being, was then employed as a junitor. yd begyrdeid ase od nedr 1866 . If de al Liter ever of bentinee plaintiff after motioe. The janitor vork to be done at the building and has her realist the fall time of a justice, hashers served and and at the basis of year time service. We received ocupanation of the parties. So far as vine evidence above, he did not at all the Layers and girling waters maddiliness and do him a space and do has histogram in territoria, persona, Tark the sensors of the building asked him to Yantong any yeurous may himy an dator universe he shall afteress watered

the union rules. The proof does not show whether there was any quarrel about this or mether taskukas was discharged for that reason. At any rate he and protest scalnet his discharge. We has not asked for reinstatement. A subsequent statement by plaintiff's president indicates asslukas was thought to be regliated, and that this was one of the reasons for discharge. The derendant, union has not complained about his discharge or asked reinstate ant.

Lefore the employment of Laslukas was Countrieted in Merch, 1936, plaintiff installed a supposed labor-saving device town as an automatic stoker, designed to perfore machanically the sork of feeding coal into the furnace. The plaintiff information of this and that it would render less janitor service necessary, wen the employment of Reslukas ended plaintiff employed a re. Vickery to perform certain services in connection with the applicants. Mrs. Vickery also took upon hereelf the duty of shoveling coal into the stoker. She is the wife of william Vickery. You ther they occupy an apartment in the besement of the building. The is paid if you wonth for her services. The husband, William Vickery, "100 100001 1 cannal services in and about the building then and as requested. . . draw no fixed salary or wages. His compensation depends on the amount of services rendered. Heither Wr. or Fre. Victory have and any coplaint as to their wages or the conditions under which they work. beither of them belongs to the defendant union. The evidence whose (and is not contradicted) that one of the placets invited a. Victory to join the union. We inquired how much it would cost and was told 1215. Wr. Vickery replied that he could not afford it.

June 21, 1037, Ous Van Heck, secretary-manager of the cefendant union, wrote to Fr. Holmes of the plaintiff corporation that
an agreement had been entered into between the Chicago Heal Istate
Beard and the Chicago Flat Janiter's Union, Local No. 1, specifying
that all buildings cared for by other than the owner much have the
services of a union juniter; that this building was being services

usion rules. The prest days when whether train was hopyeared shour this or whether has history and ter what reason. At any rate he made no protoct around his history was had not asked for reinstandant. A subscient staymant by picinbas not asked for this testimes wer thought to se a picing. and that this was one of the redeems for discharge. The emissions, union has not complained shout his discounts on acied reinstaterns.

here, of belowing the entitled to sampline and everal and an even interior of the contract of the contract that desire the contract of the contract succestio etcher, designed to prefere sechenist for sect of for the condition to the file of the phiesist informed for the continue of this end that it rould render less jouing regules appeared. the ourleymost of Fieldmis said ristavist on loyer a free Tavery to perform services in connection with the apretue, it. and when he was believed by after that all blooms were their only properly crossey the Mr wife of William Pickeys, Regulary that they beengt on epartment in the buseup of the building. ... he is the sould all ni fronting for her services. The immound, william Vishery, also render a campil rerylors in and cheek the building when end an requested. He is trees no fixed salary or mages. His companantion depends on the securit of services realizable, believe by, or my, Tirrior have delegan up anplaist as to their eager or the conditions under their they were. bliner of them belongs to the defendant union. The evidence there Assistive "As puttient should set to see any long-theorems are at heal to join the union. In inquired how much to work one and was raid Ir. Flebery regited that he could not afrest it.

June 21, 1937, due fon foot, secretary-manager of the defoodust enten, wrote to Ur. Holmes of the plaintiff composition that in agreement had been entered into between the Chicaro Faci Fetute in agreement had been entered into between the Chicaro and beve the by a non-union usu. The latter stated: "Conversion plants union jamiter this building greatly appreciated by this office." Plaintiff replied June 30, 1937, that it had no appearant with the Uniongo real totate board; that the property had been turned ever to the surperstion under decree of the ". B. District Court, and that the building was then operated under the decree by the course. Thereupon, the pickets were placed about the premises.

shows there was no labor dispute within the meaning of the statute at the time of the picketing. It is pointed out that harlakes was discharged more than fifteen months prior to the time the picketing began, and that neither he nor the union made any complaint about the discharge. There is no claim that the work necessary to be lone about these presises requires the full time of a junitar. The job at best was about one-third of a job, as shown by the fact hadrane also took care of two other buildings. The sark to be done was less after the installation of the stoker. The employment of a junitar was never more than easual in its nature. Laslubas has never asked to get his job back.

The controversy which caused the picketing of the precises was brought on by the request of the union that this casual wark should be done by some member of its organization, and apparently it was satisfied if Mr. Vickery would pay dues to the union. One this dispute rise to the dignity of a "labor dispute" within the meaning of the Anti-Injunction statute: The answer, we think, must be in the negative. In the first place, the dispute is not between the caployer and the employee. Secont cases construing this statute held this is a necessary prerequisite to application of the statute. No employee has made complaint or is now complaining. This is fatal to the defense offered.

In <u>Swing</u>, et al. v. <u>inerious rederation of Labor</u>, 37% Ill. 91, 32 %. E. (2m4) 967, the Supreme court of our state passed on this point. In that case, Swing and others filed their bill to restrain by a non-union wes, is a letter stated "coperation placing union parties the control and control of the control

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It is consented in behalf of plaintly the vilence to the stile of the time of the picketing. It is yointed out that hardware mee discolary of the time of the picketing object to the time the picketing began, and thet action is not the modern to the picketing discolary. Tears is no claim that the time of a journal of the dole about these presides requires the full time of a jourtue. The job at heat were near to other buildings. The main of a journal of a journal at the feet isoluter also test each of the other buildings. The main to be done was less after the inclaiming of the states. The main to be done was less after the inclaiming the include action as a series.

The statements with named the classities of the previous

was brought on by the request of the union that this coural rack should be done by some manhor of its organisation, and apparently it was estimited if it, Vielery reals pay dues to the anion, does this dispute rise to the Lighty of a Vieley dispute, within the mousing of the Anti-Injunction stainted The onever, we think, must be in the segnified. In the first place, the dispute is not between the carpitate and the sequence of the statute half place. In one to spatiants is not between the carpital fine and the amount of the statute half the statute to application of the statute to the statute. The complaint or is now complainted of the statute to the statute of the statute.

IA INTERNATION OF THE PROPERTY OF THE PROPERTY

the defendant union from picketing in front of plaintiffe' place of business. The defendants moved to strike; the motion and granted, and the mait disalesed for each of equity. The facts averred in the bill were that the defendant union demanded that plaintiff require its employees to join it. One of the employees belonged to the union; none of them eighed to belong to it. The employees were satisfied with their wages, hours and working conditions. This court reversed the judgment of the triel court and granted a certificate of importance to the Supreme court. (298 Ill. App. 53, 18 %. . (Snd) 256.) To the contestion of the defendants that the injunction was prohibited by the Anti-Injunction statute, the supreme court pointed out that the contrary had just been held in seasoned a siries, inc.

V. Hilkwaron Drivers' Union of Chicago, So. 753, 371 Ill. 377, 51 %. . . (2nd) 308, and said:

"The opinion in that case was filed while the present appeal was pending and in it we held the act of 1985 has no application to cases wherein there is no dispute between explayer and explayer. In that case all of the apparents presented by the appallants in this case were fully considered and it is now unnecessary for us to repeat what we then said."

There was a dissenting opinion sitted cases in which it had been held in the construction of a somewhat disliar statute that no employer-employee relationship need exist. last v. ...inner a Gempany, 303 U. W. 525, 68 S. Ct. 578, 62 U. d. 672; he begre Alliance v. sanitary drocery So., 365 U. S. 552, 58 U. St. 705, 80 L. 54. 1012; tenn v. Tile Layers Union, 301 U. S. 468, 57 L. Ct. R57, 865, 81 L. 86. 1329.

The decision of the Supreme court of this state is, of course, binding upon this sourt, and the decisions from other jurisdictions are not controlling. The upreme court of the United tates has denied pertiorari in the deadownoor case, so that the question in this state now becomes one for the legislature. In the maddenied case the supreme court distinguishing the case of ann v. like Layers Union, said:

"It is clear from this language the court was limiting its views to the particular statute under consideration and indicating, in the clearest language, that the privilege of picketing, even

the defendant union from placetic in trock of placetics placed, business, the defendants noved to strike; the setton was prosed, and the suit discinsed for want of eacity. The feets evered in the bill were that the defe dant union demanded that the testiff require the sepleyers to the late it. I can of the employers belonged so the union; now of the employers rete union; now of the employers rete importance to the faprone court. (45% 111. App. 5%, 18 s. T. (frat) importance to the faprone court is the defendants that the injunction was presided by the instruction which that it was instruction where the tale of the injunction was presided by the instruction of the waters. The man court potated.

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The opinion in the tare was tiled wills the present appeal that case all of the arguments of the this are case in this are case fully benealdered and it is now unnecessary for us to remeat this was then caid,"

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where peaceful, did not extend to eases where unlawful acts were committed or intended to be used for the purpose of legalizing secondary boycotts. Many other cases on both sides are cited, but in view of the decisions of this court condensing topoutte and rehibiting the interference with constitutional ridials, notated out herein, the acts of the ampleheas, is combining, as an act cation of individuals, to dishet in the manner described and found by the master, are unlawful acts and justified the issuence of a granest injunction as prayed."

We think, too, in this case the Master in finding the picketing one entirely percental overlooked the endenied bestiment of william Vickery to the effect that one of the wickets (Molecul) case to Vickery's apartment in the building and said that he (Vickery) "would join union or else" and 'You don't make us to book the place do you?"

The judgment will be reversed and the cause remanded with directions to set aside the order dissilving the lejunction and dismissing the bill.

REVERSED AND ASSAUDED WITH DERECTIONS.

McSurely, J., concurs. G'Connor, J., dissents.

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e think, too, in this came too tester in timing the Villian Vickery to the effect that one of the pickery (cathe to the Vickery) to Vickery's epertment in the building and said that he (Vickery) "mould join union or size" and "You don't east us to been the pince to pour"

ADMINISTRATION OF PERSONS AND PERSONS ASSESSED.

Yelmrely, J., concern.

orthograph out presently

2063 LAWRENCE AVENUE BUILDING CORPORATION,

Appellant,

VB.

GUS VAN HECK, CHICAGO ELAT JANITORS UNION, LOCAL NO. 1, JOSEPH BURNS, Appellees. APPEAL FROM SUPERIOR COURT

305 I.A. 486 21

AR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff corporation owns and operates a three-story
English basement brick building containing of store and 37 furnished
apertments of one room each with Pullman kitchen and bath, in which
about 75 tenants live. It filed its bill plaining it was involved
in no labor dispute; that its building was being picketed by meabers of defendants' Janitor's Union who by coercion and intimidation
prevented other business concerns from transacting business with
plaintiff, and plaintiff prayed that defendants be enjoined from
doing the acts and things complained of.

Defendants answered the complaint, averring there was a labor dispute between the parties, admitting that the building was picketed by members of the defendant Union and denying all wrongful acts of coercion and intimidation. The case was referred to a master in chancery who took the evidence, made his report finding that no illegal acts were committed by defendants and recommending that the suit be dismissed for want of equity. Objections and exceptions to the report were overruled, a decree entered in accordance with the recommendation of the master, and plaintiff appeals.

The record discloses that in 1936 and for some time prior thereto plaintiff employed a janitor to do the ordinary work around the building, and there is evidence that he was discharged March

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Plaintiff corporation and end coeffices a Circumstry Endelmat the can are to find come in the same of Felling Large to the Land aport onts of one room sont with Julian Wilcom and hath, it willow 75 termits live. It vil a its bill a saint it was involved in no labor discuse; that its building was being sicketed by newbers of defectants! Jeniter's Union who by coercion and Intimidation venter other business cancerne from transacting business with are leading and standards that topots billed by Printing deing the sets and things courleined of.

Defendants enswered the ecoletar, everying there was a addition our that the parties, addition that the baird bring is The animae has noise in the metab end to ereduce to beleately sew serve or coercion and intimidation. The case was referred trong rid observed was took the evidence, made his reacrit finding that no illegal acts were consitted by defindants and recommending that the east be dienissed for want of equity. Objections and exceptions to the resort were overruled, a deeree cultured in accordance with the recommendation of the master, and plaintiff .alencas

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17, 1936, on account of inefficiency, as claimed by plaintiff; while on the other hand there is evidence to the effect that he would not perform certain duties, claiming they did not properly belong to the function of a janitor; that afterward there was correspondence between the parties, the del'endants seaking to have a union janitor employed, while plaintiff's position was that a janitor was not needed because in the meantime it had installed an automatic stoker, the use of which rendered a great part of the janitor work unnecessary. Attached to the verified complaint was the affidavit of Eleanore Vickery, in which she swore she was regularly employed by plaintiff corporation "as a janitress or housekeeper;" that the building was equipped with an automatic stoker and incinerator in which the tenants deposited their garbage; that she was entirely satisfied with her compensation and working conditions, and that there was no labor dispute. On the hearing Mrs. Vickery testified that the building used about 15 tons of coal a month during the coldest weather and that she showeled the coal into the stoker.

Plaintiff's position is - and it offered evidence to that effect - that after the automatic stoker was installed it employed a houseman "who in addition to the inconsequential time in firing the automatic stoker, was employed in cleaning the building, or as a maintenance man"; that about 16 months after the janitor was discharged a representative of defendants took the matter up with plaintiff with a view to having a union janitor employed to work at the building, and said that if hr. Vickery, the houseman then employed at the building, continued to do the janitor work he would be required to join the union at an initiation fee of \$212, and that unless this were done defendants' union would cause the building to be picketed; that June 21, 1937, the union representative wrote plaintiff that the union had entered into an agreement with the

17, 1936, on account of inefficiency, as claimed by claimifff; and suit the Vie and or estable of event band unit out to alidw would not perfere cortain duties, claiming bing did not properly belong to the function of a junitar; that afterward there was derrespondence between the parties, the defendants secting to have a union javitor employed, while wieintif's socition was that a juniter was not needed beeneed is the mantine it had installed and for the acolust to see of the contract a great cart of the junitor work unnecessary. Attached to the verified com laint was the affidavit of Missoure Vickery, in which she swore whe was regularly employed by plaintiff corporation "as a janitron or olimotus an aliw becoive and quiblind out tast progentosued mient betieven atmost shi deld at reteration has redete has muiteemenes ted nitiv beileffee yleriins and end ted; enedran working conditions, and thet there was no labor dispute. bearing I re. Wick my testified that the building used about 15 tens of coal a month during the coldest weather and that the shoveled almoste with artist days have

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Plaintiff's position is - and it offered evidence to that effect - that after the automatic striet was installed it employed a houseman "who in addition to the inconsequential time in firing the satemetic stoker, was employed in clearing the bailding, or as maintenance men"; that about 16 months after the jamitor was discharged a representative of defendants took the metter up with plaintiff with a view to having a union jamitor employed to work employed at the bailding, continued to do the jamitor work he would be required to join the union at an initiation fee of "212, and that write a representation the union at an initiation fee of "212, and that

Chicago Real Estate Board, which agreement specified that all build-

Chicago Real Estate Found, which agreement specified that all buildings operated by anyone other than the owner must have the services of a union janitor, and sought to have plaintiff employ a union janitor.

Plaintiff also offered evidence to show that about July,

1937, a picket was sent to the tuilding, who was later joined by

another picket; that they walked up and down in the rear of the

building bearing a placard on which was printed, "Lhis building

unfair to organized labor. Chicago Flat Janitor's Union, Local

bumber 1 m. F. L."; and that they stated to persons who sought to

make deliveries and to do business with plaintiff's tailding that

plaintiff was unfair to union labor.

ran into the building, grabbed a vorman by the arm and prevented the removal of ashes, and said he would call out his game and clean up the situation; that on another occasion notert cheed, business agent of the union, threatened william Victory, who worked part time at the building as maintenance man and part time as junitor, saying that unless the union's demand was not by hiring a union janitor the place would be bombed.

The picket, Burns, called by defermants, testified that he was sent to the building as a picket July 30, 1937, wearing a banner on which were printed words to the effect that the building was unfair to union labor. He denied he had threatened anyone at the building; testified that he had talked to a number of persons who came to deliver laundry and other supplies to the building and told them of the dispute, and that these men being union men refused thereafter to deliver to the building.

agent for the defendants for 11 years; that it was reported there was a non-union janitor working on plaintiff's building; that he

Obtango Real Detain fourd, which agreems specified that all buildings operated by seyons other than the owner and have the services of a union justion, and sought to have plaintiff engloy a union justion.

Ilaintit' slos efferes evidence to show that about July, 1837, a picket was a set to the building, who are later joined by mother picket; that they wanked up and down in the rise of the building bearing a placard on which was printed, "into building bearing a placard on which was printed, "into building unfair to or anised labor. This equal latitude? a building bearing a labor. This satisfies a building that it is set that the placatiff's latitury that make deliveries and to do be income the placatiff's latitury that placintiff was unfair to union lebor.

ner, Viewery Lestified disables coession hume, the picket, real into the building, gradeed a vorance by the arm and ended the removal of school, and this he would call out his gard sent clean up the situation; that the thetier occasion motert is beed, easiness than at the building as maintenance man and part time as faulter, saying that unless the amion's densite was met by hiring a union saying that the place would be bouted.

the picset, summs, called by defandants, testified than he was sent to the hulding as a picket July 50, 1937, wearing a banner of the man ware printed words to the effect that the hulding was unfinite union labor. Is denied he had threatened anyone at the hulding and told a to deliver laundry and other supplies to the building and told the officer to deliver to the building.

Molecod, called by defendants, testified he was besiness that it was reported there

went to the building, saw are. Vickery and later her husband, ar. Vickery, came in; that the witness asked him if he had a union card and Vickery answered, "No." He denied forcing his way into the Vickery apartment or that he made any threats.

There is other evidence to the effect that on one occasion the police were called to the building and found Burns and the other picket in the alley, drew their guns, arrested them and took them to the police station, but no complaint was lodged against them when the facts were explained.

Considerable other evidence offered by plaintiff is in the record tending to show that the pickets and other representatives of defendants' union used threats and intimidation to prevent delivery of goods to the building or the removal of sames, etc. On the other side the evidence is to the effect that no such threats or intimidation were indulged in by the pickets or anyone else.

We will not detail the evidence further. The master went into the facts semewhat in detail, finding in substance that plaintiff had failed to sustain its claim of threats and intimdation by a preponderance of the evidence. The picketing was admitted but defendants claimed it was peaceful and therefore ought not to be enjoined, because of par. 2a, sec. 1, chap. 48, Int. Rev. state. 1927 The formal master saw and heard the witnesses testify; his finding was approved to by the chancellor. In these circumstances we are not authorized under the law to disturb the finding unless we are of opinion that it is against the manifest weight of the evidence. Pasedach v. Auw., 364 Ill., 491; Stasch v. Stasch, 355 Ill. 581; Aosahowski v. Basden.

Upon a careful consideration of all the evidence we are unable to say that the decree of the court is against the manifest weight of the evidence. The finding of the master and of the chancellor was that the picketing and persuasion were peaceful and lawful, and since

369 Ill. 252.

o the building, now are, Victory and later ner burbest, ar. Victory, same in; that the witness asied him if he had a union eard and Victory answered, "No." He "esied foreing his way into the Victory appreamnt or that he sade any threate.

The police were called to the bull-ling and found hurns and the other picket in the alleg, drew tasis gues, arrested these and took those to the police station, but no complaint was lodged against them when the facts were explained.

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that the decree of the court is against the manifest weight of the syling of the manifest weight of the syldence. The finding of the master and of the chancellor was

the passage by the legislature in 1925 of section 1, par. 2a, chap. 48, Ill. Rev. State. 1937 Such picketing and persuasion are not to be enjoined. This is the holding of our Supreme court in Fencke Bros. v. Upholsterers Union, 358 Ill. 239.

counsel for plaintiff in their reply brief say, "Interference with customers, interference with persons with whom plaintiff had contracts, was the basis of the complaint. Throughout the hearing plaintiff was willing, and is now willing, to permit all the picketing defendants desire, if they will confine themselves to the front of the building and give vent to the advertising campaign, but contends the defendants' actions were, no matter what the defendants call it, a boycott." We think it obvious that picketing in front of the building would serve little or no purpose for the reason that apparently all deliveries were made in the rear and not in the front of the building.

We are also of opinion that the primary purpose of the picketing was not to establish a boycott and injure plaintiff, as it contends, but on the contrary the building was picketed in an endeavor to benefit defendants' union and its members.

complaint is also made that the court erred in excluding evidence offered by plaintiff to the effect that some of the drivers of trucks who came to deliver goods to or receive goods from the building told an employee of plaintiff what the picket had said to on such drivers. Some of this evidence was objection ruled out as being hearsay. We think the point made is not of importance in view of the fact that a number of drivers were called who testified in substance that when they were advised by the pickets of the union's complaint they refused to so to the building afterward for the purpose of receiving or delivering goods because they were union men, and under their union rules ought not to "run" a picket line.

And it is shown that afterward some deliveries were not made because

the passage by the legicisture is 1925 of seafern 1, par. in, in a seafern 1 constant of the c

ence with customers, antiference and remains the contracts, was sinant had contracts, was the basis of the complaint. Throughout the haring plaintiff was withing, and is now william, to serait all the picketing defendants besieve, if they will empire inconstress to the front of the bailling and give east to the advertiping compaint, but contents the defendants the defendants on about what the services actions were, no another ries the services call it, a beyont." To take it to bailes a purpose since the reason that apprending would serve little or no purpose and not in the frant of the bailaing.

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to do so would be a violation of the rules of the union to which the men belonged.

For the reasons stated the decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

to do so would be a violation of the mules of me union to waish the men belonged.

strace resease the learned the deers of the Daperter court to

Medurely, P. J., and intelnet, J., comeur.

BOND STORES, ING., a corporation,

THE CHICAGOAN, INC., porpor tion, HOTAL CHICAGOAN CARE TO Y., a corporation,

von lan≱e,

COOK COUNTY.

ALBERT HAPPIN, INC., a compary flon.

305 I.A. 487

MR. PRESIDING SWITTER MICHELY WAR LIVERS THE STREET HE SUNT.

In an action in forcible detainer to recover additional space in a building located at 63-00 . Indian itself in thicago, defendants cade a sotion to strike which was allowed, and defendants appeal.

The rights of the parties are based on certain leases and agreenests attached to the affidavit for judgment, remarkables are not denied in the affidavit submitted in helial of defendants.

It appears that December 17, 1989, the Moir Notel Company demised certain space in this building to Illinois Dond Torse, Inc.
The hotel assigned this lease to another composition anomals of West Madison Offset building Corporation. The assignes made a supplementary agreement in writing with Illinois Bond Morae, Inc., whereby the space of the leases was enlarged to include all the third floor of the building with the emeption of sample rooms on the north side of it and corridors leading to it. This agreement also provided that the leases might further enlarge this space so as to include all the third floor upon 30 days written notice to the lease to enter into an appropriate agreement covering the additional space.

On the same day the lessor (65 set Madison Street Mailding Corporation) entered into a supplementary agreement in writing with the lavoy Juliding Corporation which held a prior lesse. By this supplementary agreement it was provided that the lavoy Mailding Corporation

Total Carried State Company of the Carried State Carried S

th. Purchase Junio Service of International Control of the Caste.

In an action in forethic detainer to recover additional space in thicogo, space in a bulleton, and indirectly aftendants make a motion to strike which was denied, and plaintiff a motion for summary judgment which was allowed, and correct as motion for summary judgment which was allowed, and correct as

The rights of the parties are hand on certain latter and agreements attended to the affidavit for judgment, terms of thick are mot denied in the affidavit cubaltary in behalf of decadents.

It serves that because 17, last, the bein bord company demiced certain space in this hallding to Illineis done tores, los. The hotel sesigned this lease to another corporation known as 95 destraction street bailding Corporation. The assigned made a samplementary agreement in writing with Illinois Bond Teore, inc., whereby the space of the leases was onlarged to include all the third floor of the bailding with the enception of sample roose on the north side of it and corridors leading so it. This agreement class provided that the leases might further enlarge this space so as to include all the third floor upon 20 days written notice to the leason to day arists notice to the leason to safer upon 20 days written notice to the leason to safer the on appropriate agreement covering the additional

On the same day the lessor (55 est hadhest Street hallding

poration would riskly up promptly this additional come on the third floor them under lease to it, if illinois ment sterms, inc. should at any time become antitled to take this additional space under its agreement of the same date with the leasar. Avey otal afterwards changed its name to the Chicagoan, inc., and on April 5, 1957, Illinois would sterm, inc. ressioned all its right, vitie and interest under its lease and agreements with reference to these premises to plaintiff.

So best Hadison Street Building Sorporation, requesting this additional space and requesting the corporation to execute an appropriate agreement as provided. On Deptember 19, 1933, the Building Sorporation, as lesser, desired to plaintiff the additional space pursuant to this agreement of December 21, 1936. On Cotaber 10, 1939, plaintiff made a written demand on the defendant, Chicagoan, for the possession of the premises which was refused, and January 7, 1939, this suit was filed. The other defendants are sub-tenants of the Rotel Chicago, Inc.

The agreement of December 31, 1936, between 65 sect Madison Street Building Corporation and Illinois Bond Street, Inc. recited: "It is contemplated by the parties hereto that the Leases may hereafter require an enlargement of its space on said third story for merchandising purposes. In the lease between the Leaser and Lavoy Matel Corporation covering the hotel portion of said building the Leaser has reserved the right to withdraw from the hotel tenant such additional space on the third story of said building as might be hereafter granted to the Leases pursuant to this amendment. The Leaser agrees that it will within thirty (30) days after the receipt of a written request from the Leases enter into an appropriate agreement, in which all of the parties hereto shall join, further enlarging the demised space so as to include all or said third story with the exception of such space as is taken for building slevators and other utilities. Said agreement shall en-

paration smuld yield up grampily this additional ecose on the third Place Vien under lears to it, if Illinois dend larges, Inc. should suy time haceus entitled to take this additional erace under its in the continuity of the additional erace under its in the continuity of the lease and a greenants with reference to these previous to under its lease and a greenants with reference to these previous to

tional system and requesting the suspension to excess an appropriate poration, as lessor, demised to plaintiff the additional space rur-cuant to this agreement of locamber 51, 1926. On Cotober 10, 1921, plaintiff ands a written demand on the defendant, Chicagoun, for the personation which was refused, and demony F, 1975, this suit was filed. The other defendants are sub-tenants of the field Chicago, Inc.

recited: "It is contactlated by the parties have's that the lease way havenfor require an enlargement of its eques on soid third nowy for nerohandising purposes. In the lease between the hercor and larvy fietal Corporation covering the hotel perties of said building the Leaser has recoved the right to withdraw from the hotel tensor such additional space on the third story of said building an adolt he hercaffer granted to the Leaves pursuant to this anondment. The Leaser agrees that it will within thirty (20) days anondment.

THE CAMES AS AN ADDRESS OF THE PROPERTY AND ASSOCIATION ASSOCIATION AND ASSOCIATION AND ASSOCIATION AS

pressly preserve all of the covenants and agreements contained in said Lease as heretofore and hereby amended " " " "."

By the lease of December 31, 1936, to the Savoy Notel Corporation, as leasee, after resiting the provisions of the lease to Illinois Bond Stores, Inc., section 2 of the lease recites. The Lorses asknowledger that it is familiar with wold fond Stores lease as now amended and with the provisions of said further amendment thereto to be assouted at or about the time of the esseution of this indenture referred to in Article First hereof. The Lease agrees to afford the said hand Stores, as leoper under said bond stores lease, as smended as aforecald, the following rights and sarvices as a solfied and defined in enic bond blore lease as no or hereafter amended: * * * . * Section 4 recites: "The Lessee covenants that if said Beni Stores should at any time hereafter become entitled to take the additional space on the third story of said building, pursuant to said assendment referred to in Article First hereof, to be executed at or about the time of the execution of this indenture, the Lesses will promptly yield up possession of said additional space and afford said tond there reasonable facilities for accomplishing any suitable or appropriate revisions in or alterations of said additional space. "

The defendant, Chicagoan, Inc., says defendants are in possession not as mere tenants at will but hold under a lease which demised the premises for a term of thirty years. It argues that defendants have the right to question the sption granted to plaintiff by plaintiff's lessor. It is said that the right of plaintiff to exercise the option is conditioned upon plaintiff's requirements and needs; that no particular form of language or technical words are required to create such a condition precedent, and that strict compliance with the terms and conditions was necessary; that it was necessary for plaintiff to ever in its complaint and to prove upon the trial an actual bons fide latention to use the presists for the stipulated purpose, and that plaintiff's lessor could not valve this

presely preverve all of the coveniess and egressurits contained in

My the lases of becomer IL. late, to the bares here! Corporation, us lesses, efter reciting the previous of the lease to Milimola Dend Wester, Inc., section 2 of the Leurs section. The essel seves to a blas with the facilitat al the total to an item as a second reminent and with the container of the balence were as to neithborse and he said the that and a bedreens of et ofered this induction selesyed to in Aphiels First Legent, De Lageragrees to afford the said lend theret, as lesers under and lend Stores Lease, as smessed as aforesaid, the reliabley rights and con no practices as openities in the said bears as party one or hereafter ununded: * * * . - - otton & rectast The Lessee coverants that is said dond Steres should at any time bereafter bocome entitled to take the additional space on the third story of maid building, pursuant to said maradment referred to in Article Piret bereef, to be executed at or about the time of the encouling of this indesture, the Lecces will prometly yield up pomession of pid morest arrord hard bias Atothe and spage Isnellibbs bias facilities for accoupilishing and antichle or sprepriese revisions in or elterations of said additional space."

The definition, This span, Inc., says defendants are in persection not as more tenants at will but hold under a louse which deuleed the presides for a term of thirty years. It argues that defendants have the right to question the option granted to plain tiff by plaintiff's lessor. It is said that the right of plaintiff alone in the said that the right of plaintiff and needs; that no particular form of language or technical words are required to create such a condition procedent, and that strict own increasing; that it was

ments, first, between plaintiff and plaintiff's langer, and remarks, first, between plaintiff's lessor and defendants, were under on the same day and relate to the same midjet matter, were known to all the parties and were executed for a damman purpose. Therefore, it is argued, these must be construed together.

Defendant says it is a lirent honeficiary of the limitations imposed on the option of plaintiff for the disputet apace, and that the contract between plaintiff and its leaser was for the immedit of defendants, and that defendants are, therefore, sutilled to have its provisions enforced; that the complaint was insufficient in failing to allege that the additional space and needed by plaintiff for merchandising purposes, and that, as a matter of law, when a right of action depends upon the performance of an antecedent accountion or the existence of an antecedent fact, a complainant must seep the existence of the fact or performance of the sondition. It is said this proposition of law is applicable to a complaint in foreible detainer; that pleadings are to be construed strictly against the pleader, and assuming the law to be as set forth, the evidenciary facts as disclosed by the affidavits in support of and against summary judgment are insufficient, and that there was an issue of fact for the court or jury as to whether plaintiff in fact 'required' the additional space for merchandising purposes or whether it messed the additional space at all. The affidavit submitted in behalf of defendant denied that the additional space was needed by plaintiff for marchandising purposes and denied that plaintiff intended to use it for that purpose, and averred that its request for the additional space was not made in good faith. As evidence of this the affidevit states that authorized agents of plaintiff stated to agents of defeatants that plaintiff did not intend to use the space for merchandising purposes and, as a matter of fact, some time in the future intended to use it for other purposes.

If the law applicable is as stated by defendants, we think

domition precedent for detendants; that the contrasts and agreements, first, between plaintiff and plaintiff's lessor, and encoudly, between plaintiff's lessor and defracints, were made on the case day and relate to the case oubject satter, note known to all the parties and new exacuted for a common purpose. Therefore, it is argued, these must be construct to common purpose. Therefore, it is

Defenient eage it is a direct breefichary of the limitalions imposed on the option of plaintiff for the disputed agect, and that the confess by been platerist and the leaser and for the penelts of defendants, and that defendants are, transfore, entitled so have the provisions entered; that the complaint and incurricated in Trituinis ye hobors new compa innolities and that applies of mailles for merchendicing purposes, and that, as a matter of lar, when a pickt of action depends upon the performance of an anseccious condition or the enictenes of an entecedent fact, a complainant must aver the existence of thefact or performance of the condition. It is cald this proposition of law is applicable to a complaint in Powellia detelact; that pleadings are to be constanted strictly spained the pleader, and seeming the law to be so out forth, the evidencing facing has to drapper at adivability of the the story to rural na new areas that then theelestinant are translut grammer "Harlung" tool at Thislely redieds of an gust to Jusco out to 1 fool below it yellow to recognize mildlessings of step lastifities all The additional opens at all, The affidavit submitted at banal of Attailed to belook our soun facilitation and that belook the plaintfi for merchandising purposes and tenied that plaintiff intended to use faralities out for recurred that the recurred the chiliteral space were not made in good failing to evidence of this the affidavity -ab to arraya of hainte thintally to atrage beclevibus fall notate year and reagn out sen of heated fre his thirders but afended purpores and, as a matter of fact, some time in the future intended to use it for other purposes,

it would follow that the affidavite disclose an lasur of fact. However, we do not agree that the agreements can be interpreted according to defendant's contention. There was no appearent or contract between plaintiff and any one of the of minute. There was no contractual relationship between thes. The approximat of December 31, 1936, between plaintiff and its lesser was not for the benefit of defendants. The Chicagona, Inc. in its lease of mosaler 21, 1938, acknowledged that it had notice of the agreement between plaintiff and plaintiff's lessor under which plaintiff but the right to request and obtain additional space, this space being port of that which was leased to the Chicagosa, Inc. by the terms of the agreement between glaintiff's lessor and the defendants, defendant bound itself to yield up possession of the additional asses if and when plaintiff became entitled to it under the agreement between plaintiff and its lessor. The use which plaintiff aight cake of the additional space was a matter wholly immaterial in so far as defendant is concerned. The condition of the outlon was not that plaintiff might need or require the space but that plaintiff should notify its lessor and abtain from it an exregment for the lensing of such additional space. This was the condition precedent and the only one in so far as this defendant is concerned. Fislatiff's lessor is not a party to this proceeding. The option was from plaintiff's lessor to plaintiff, and while the contract recited the circumetances which might in the future cause plaintiff to exercise its option, that circumstance was not made the condition upon which the lease of the additional space was to be executed. Under the plain terms of defendant's contract with the lesser defendant agreed to surrender the additional space upon the execution of a lease thereof by its lesser to the plaintiff, and upon the execution of such lease to plaintiff, plaintiff became entitled to the possession of these presides. The affidavit for defendant tenders an impaterial issue.

.e have no quarrel with the law as elted in defendant's

. ..

it would follow that the affidavite discloss an issue of fact. However, we do not agree that the egreenests as interprete was no femoustry on his world saniforming a fundamental of unknown tract between plaintiff and any one of the defendance. . here was no contractual relationable between them. In agreement of 31, 1886, between plaintiff and its lesser was not for the benefit The Chicagean, Inc. is its lasse of December 21, of defendants. 1828, acknowledged that it had notice of whe agreement hetere tright and bed likinkale doing rebou reces a likakale has likinkale to request and obtain additional apoon, this space being part of that which was lovered to the Chiespon, inc. it the torse of the agreement between glaintliff a leason and the defeatents, defeatent bas Il soogs famolyiche and To meineason as hiery of Tierri bases secreted Incompage and union II as healthou amount Thirdalous resis plaintiff and its lessor. The use which plaintiff might water for the additional epace was a matter wholly immaterial in so for as defendant in concerned. The condition of the option was not that ofmont thirthing rang and assess our sellower we have bridge thirthing notify in Lauran and ontain from it so advanced for the Lauran and hand selections was the condition crosses Isuation of the only and in so far as this defendent is denormed. Flaintiff's larger is not a party to this proceeding. The option was from plain--tip descent to plaintiff, and chile the contract people the oir est enjoyen which in the freque easte all ships delife to easte easte spillen, that of roundinde was ned while the condition upon which the lease of the saidtional space was to be executed. Under the plain of Access finingled warred will order tocorner allegations in access water the additional speed appearance the second transfer the bear the of by its lessor to the plaintiff, and upon the escentian of such lease to plaintiff, plaintiff became entitled to the possession of these procises. The attidavit for defendant tenders as immeterial a hope to d

brief and elaborately argued by it with citation of more than one hundred and seventy-five authorities. The law is alcountary. The undisputed facts show that it is not applicable.

The purpose of a summary proceeding is that the court may determine where there is any issue of fact to be tried. If we understand the law applicable it appears here there is no laste of fact. Chicago litle : Trust Co. v. Cohen, 284 Ill. App. 181, 197; Spry v. Chicago hy, quipment Co., 298 Ill. App. 471, 475; Roberts v. Sauerman Bros., Inc., 300 111. App. 213, 217. Defendant says. however, that forcible detainer was not available to plaintiff; that its proper remedy was either by suit at law for damages on the covenant or by suit in equity for specific performance. Defendant is mistaken. Summary judgment may properly be entered in a foreible detainer action. Wainscott v. Penikoff, 267 III. App. 78. Plaistiff could maintain its suit for possession under the Foreible Detainer Statute. \$8, par. 4, Chap. 57, Ill. State Mar State. 1030, p. 1713. Personal Home Wortgage Co. v. Seegrin, 278 Ill. App. 410; West Side Trust & Mavines Bank v. Lopoten, 388 Ill. 681, 686; Wainscott v. Penikoff, 287 111. App. 78; Waldblatt Bros. v. Moefeld, Inc., 284 Ill. App. 31, 37.

The judgment will be affirmed.

JUDOMENT AFFIRMED.

O'Connor and McSurely, JJ., concur.

brief and elaborately expand by it nith mitation of norm than one bundred and coverty-five authorities. The law is elementary. The uniterated facts abor that it is not applicable.

The surgess of a numery proceeding is that the court usy intermine where there is any lacus of fact to be tried. If we understand the applicable it appears bere there is no from at fort, Objects fidth & Treat. Dr. 7, School Std. Ell. App. Ltl. 107) STREET, 1871 to begarned from the control of the test of the control of the this first foreign of eldstare our new newhateh eldstell this tte proper remain was either by mult et les for demange au the fallsol. .. onercolog citicers as flupe at time of to tenoves is mistaken. Summary judgment may properly be externed in a feroidia detailmer action, represent to Protect the Till, new TV. Plante tiff sould militain its mit for possession walov the levelile Detailant Harries, 47, year, in Thing, 47, 121, thate har I hain, 2005, p. 1715. Ferronal New Morkers Co. v. Georgia, 275 Ill. 13p. 4191 lest bide Truet & Sevines Donk v. Lopotes, 569 711. 681, 689; Marinel or agent statebased out one off The Marinet or Streetskill THE LAST WORK AND MADE IN COLUMN

James No. of City Personal Law.

JUNEAU WELLES

Personal and Section of Personal Community

41079

WILLARD L. LAUEN, Administrator of the Estate of Samuel C. Lauer,

Beceased.

Ama Llago

TIGIL, JULIET COMPANY, a corder tion.

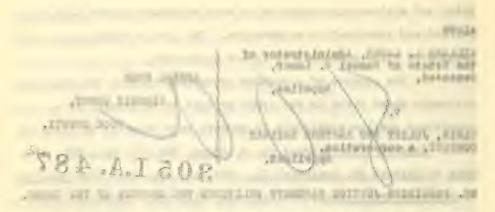
AT MAL PHON GIRGUIT COURT. OK COUNTY.

MR. PRESIDEN STATICE MANUSCRIED LIVERS THE COTATION OF THE COURT.

In an action under the statute for wrongful death, upon trial by jury there was a vertict for plaintiff with damages of 7500, on which judgment was entered. This is a con snion mast to General to. 40010 by the administrator of the estate of Lila . Lauer. in which an opinion has been this day filed.

The Lauers, husband and wife, died as a result of injuries sustained Movember 20, 1007, when the entemphile is which they ware riding was struck by one of defendant's care which was being purhed east on tracks which intersected Euclid avenue, a public highway running north and south in the City of Chicago Leighte in Look county. The material facts are the same in both same, but for convenience we restate these facts here.

" " The accident in which these two lost their lives occurred dovember 20, 1037, at about 8:00 . . They are ridle in an Oldenobile automobile, which Wr. Lener was driving. Muchid avenue was paved. It was crossed at right angles by defendant's right-of-way on which there are six tracks 71 fast wide from the northernment to the southernment rail. Fictures are in evidence showing the situation at the crossing at the time of the accident. On the west side of the street, & feet north of the northernment track and E3 feet to the west of the west line of the avenue, was a small shanty used by a flagman. Fifty feet to the west of this was a small latrice building. Thirteen feet north of the northerly track and 8 feet west of the street was a gross-ore bearing the



In an action index the restate for erea, fel desti, and it is a fee to the to tree to tree to thick judgment was entered. This is a continuen ness to Coneral Fo. 40018 by the chilaterator of the entete or Film i. Lanc

The Lawers, imphased and eite, died as a result of injuries riding as a bruck by one of defendent's case widen as maing pucked arming north and south in the City of Chicago Heights in Lock cause, hat for convenience we rectal foots are the same in hoth cares, hat for convenience we rectate their facts here.

est the soldent in which there has lest their lives an aldenship these an aldenshie automobile automobile, which ir, Lener car driving. Inclided as a part of the save of the sheat from the right of may on which there are an tracks II feet vide from the choring the sheat the creasing at the time of the accident. The west at the accident. It was alter the accident. It was alter the accident. It was alter the avenue, was the west of the avenue, was track and 23 feet to the meath of the avenue, was a small latting building. Thirteen feet to the west of this sault intends a small latting building. Thirteen feet north of the northerly

words "Mailway Crossing." About 150 feet north of the track was a round sign bearing the latters ". . " Thirtnen fout north of the oposeing and & feet sust of the highway was a street limit. This was the only light within 200 feet of the crossing, would avenue was designated as a through atrest by the proper authorities. Stepsigns were called at every intersecting street. There was no light of any kind on the opensing or on the west side of the street. The payment of inelia evenue was hi fact wide at this place. As tring of defendant ran ever the two luner tracks. The outside tracks were used for storage purposes. Lest of the flagman's chunty was a stone and wire fence. There was evidence from which the jury sight believe that on the night of the accident a train of railroad care was standing on the north track to the west of the crassing. If this was true, these would tend to obscure the vision of travelage approaching from the north. The flagman was not on duty at this time. There was no vi-way or moving signal of any bind mintained by defendant at the crossing. There was as light in the cross-aras and no light on the erecking at all so fur as the railread was concerned. The only artificial light was the are already described on the east side of the avenue. There had been snow in the sorning and the pavement was slippery.

Witness and who was called to testify by both plaintiff and defendant, said the meen was shining, but other evidence indicated it was
dark at the time. Heradon had been employed by defendant for about
twenty-two years. The crew in charge of defendant's train sensisted
of Heradon, another brakenan, a conductor, and engineer and a fireman. The train consisted of about eight cars which had been picked
up at Joliet. The car furthest to the east in the train was a
gondola car, and the engine was pushing this and the seven other
cars east across the intersection. Heradon says he was sitting on
the southeast corner of the gondola car, which he thinks was empty.
He had an electric lantern such as he used in giving signals to the

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witness and who was called to testify by both plaintiff and defendant, cald the meen was chining, but other evidence indicated it can dark at the time. Harndon had been employed by defendant for about femity-two years. The eres in charge of defendant's train consisted of Paraden, another business, a conductor, and engineer and a fireman. The train consisted of about eight care which had been stoked up at Joliet. The car farthest to the east in the train mas a gendels car, and the engine was pushing this and the seven other

t corner of the gendela car, which he thinks was eapty.

engineer and others of the crew. There was no other light on the gondola. He was on the top, about 10 or 12 feet from the ground. The engine which was pushing the train of care had electric headlights in front and also on electric headlight on the rear. It was a road type of engine. The crew had run around other care right west of the sressing on ac to get these particular cars should be them and deliver the wase to the L. E. I., which was about threequarters of a sile sast of where the accident happened. There was a box car in the train which was higher than the condule. The other brakeman on the train rade on the one just sching the contain. These care were from 40 to 50 feet in length, so the front and of the engine which was pushing from the year was about 400 fact from where Berndon was riding. The train was naving on the fourth track from the north. Herndon says that it was soving about 8 or 10 miles an hour. He first saw the automobile coming south at a good of about 35 wiles an hour when the front and of his train was about 150 feet west from the cressing. The autosobile, he says, was then 300 to 400 feet to the morth. The beatlights of the automobile were lighted. He says the whietle of the train was blowing. He mand the whistle and was the automobile practically at the case time, then about 80 to 75 feet from the eressing he swang his lantern out across it as far as he could reach out from the car, leaning forward. We swung it east and west in the same direction to train was going. He did not get down from the car onto the ground, and no one was on the ground signaling. The lantern was an electric with two bulbs. It was produced in this court on oral argument. Each bulb is about one-quarter of an inch in dispeter. Only one of these was lighted. When the train was about 12 feet from the aroneing he gave the first signal to the engineer. The automobile ald not stop. We felt the engineer apply the air brakes and the train stopped about 120 to 130 feet from the point at which he gave the signal. The draw har or coupling of the gondola car hit the auto-

empineer and others of the even. There was no other idea on the de vas on tien ton, about 20 en 11 fast fran Sectional. -lass class is lad area to mist tell midney are this enign off . name and my definitioned are color on the and the definite s road type of engine. The eres had two eround eller ever right west at the expecting so as to got these particular ours about of them and deliver the sense to the f. i. i. i. idde one short thurs. .ar squa. . despaged facilities and wards to have alle a to weite all a box cer in the train which was higher than the goutela. brake wen on the train rode on the err just benied the sectols. These care were from 40 to 30 feet in length, so the front of mout feel für lunde ens teet add mout maldeut mas detals malgae eds where Meredon was riding. The train was moving on the fourth trank from the north. Peradon says that it was meving shout 2 or li wiles on hour. He first our the automobile center south at a speed of year new hear the front out that train the train 180 foot word from the eronoing. The automobile, he says, sup then Not be all fact to the seek. The beat give at the enterential arts lighted. He says the whittle of the train was blowing. To heard the which and the the column alliformity and the south and then about 50 to 75 feet from the excenter be every his lintern out across it as for as he could read out from the car, leading forward. He swam It seet and west in the same direction the train was going. He did not got doen from the car onto the around, and so one was on the ground signaling. The instern was an cleaved Descripts from so burns whit all bestboth one fit added not drive had bulb is about one-marker of an inch in dimeter, this one of these was ligated. When the train was about 12 feet from the armering he gave the first signal to the engineer. "he enteredile the her along, in this the augineer spein the circle and that the esopped about 170 to 170 feet from the point at which he gave the

mobile right in the center and carried it over the crossing. The

At the close of all the evidence defendant made a motion for an instructed verdict in its favor, which was denied, and it is argued in this court that the instruction should have been given because difer any was not regligent in protecting the erossing or in the operation of ite train, and because Mr. Lauer was guilty of contributory negligence. In case No. 40919, we have held that so far as protection of the crossing and the operation of the train were concerned the question of the na liganes of the defendant was properly submitted to the jury. The drassing as mintained and unusually dangerous and the jury could properly find that defendant was negligent in failing to have a flagman of the crossing of the time of the accident and in railing to see that recommoly sare lighte and signals very maintained there. se think, too, the quostion of whether there was negligence in the operation of the train was also for the jury. . thave so held in the opposion case, and the examination of the evidence in this case does not Dersund us to a different conclusion. Ter Cop v. Tyor, 34 Ill. 556.

The question of the contributory negligeness of r. Lever presents a question different from that we decided in the other case. Ar. Lever was driving the autosobile and was in control of it. If there was negligenes in driving it it was his negligenes. As in the other case so here, decident v. C. a. I. I. Ay. Co., 240 III. 120; Morgan v. Bockford, B. & J. By. Co., 251 III. App. 127; Mresumald v. Baltimore & O. A. Co., 352 III. Sty; and Frevenzano v. III. Cont.

A. Co., 357 III. 198, are cited and relied on. According to the cases, it was for the plaintiff in the first instance to produce some evidence tending to show ordinary care on the part of r. Lauer. There was an eyewithese, and no evidence was offered or received as to the habits of the deceased with reference to care. The evidence shows that at the time of the accident Fr. Lauer was forty-nice years of age. He was in good health; his eyesight was good. The evidence

action right is the contro and ourself if over the recentur. The contract of the right of the relicer of the collection and if the close of all the sylfence infection.

for an including verties in the favor, which was seried, upt it is garde grad or a bluede notteertant out fait frace ated at heart second defeatant was not negligate in pretenting the creating that the openation of the train, and because in laws -es wellty of the mogligenes. In case to 1991s, so been nit this tions and the estate or the printer and the estate of the and processed the question of the medical of the delegate and are benighted as and ensure off and and benighted alternation neutly dangerous and the jury sould proveyly find that left defends off is printed to its mangail a word of untilat at to it. olar yld seesant told one to millet at the tradition off to smit lights and signals over maintuined there, so think, tee, the questo of sharker there was negligence in the queryious of the train our aine for the jury, is have so held in the comparion cons, and the of An absorbed the next seen while of amounting sold be explained seen distribution to the the the the term of the term.

The procise of the contributery negligates of the fance of the search seater a question different from there we decided in the other case. It is, fruer was driving the automobils and was in central of it. If the season was his negligates, as in the season seafly and the first twen his negligates, as in the first transfer of the plaintiff in the first instance to product to the season whe season was an eyestimes, and we evidence was offered or received as to the habits of the deceased with reference to care. The evidence so the habits of the deceased with reference to care. The evidence shows that the time of the sections if, takes was forth-wise paper

also tehis to the le as driving the stoppells out on solid avenue at the speed of about 26 to 30 miles per hour. The jury could conclude that such speed indicated due care on his cart. pefendant says that jolice of floors could see the cars on the operatur when at a distance of 150 fort. The inference is that p. Laury should have seen then. This is unfair since at the time the officers viewed the scene of the accident the train of cars was perked scross the street and at a standerill. The mendiant on the opening (unlike the cituation when Wr. Lauer approached the erossing) made the train visible. also, there was a spotlight on the squad our of the policemen as they approached. The lanters used by err on in his attempt to warn the approaching automobile, as as have already said, had a small electric bulb, and there was swidence from which the jury might well have believed that it would not have been seen by Mr. Lauer under the direumstances in the exercise of due care. Berndon says it was noonlight, but this was contradicted and seems improbable. Heradon gives no avidence tending to show as ligance on the part of "r. lauer, with the exception that he kept on driving toward the crossing at a moderate rate of speed not either and in the approaching train. It is apparent Laner was lookin ahand of him, and if he had seen the train it is fair to presume he would have stopped. The cases are all to the effect that the question of cantributory negligence, under such circumstances, is for the jury. railroad erossing is, of course, known to be dangerous by every person of experience. The cases say one approaching a crossing should look and listen, but the cases also say that it is not at all times and under all circumstances negligent not to do so. Here all the circumstances as to the physical situation at the crossing, the condition of the weather, the location of the train, etc. must be taken into consideration. The following cases justify a holding that the question of Lauer's contributory negligence, if any, was for the jury: Lannon v. City of Chicago, 189 Ill. App. 598; C. a C. I. My. Co. v. Beaver, 199 Ill. 34; Lundewiet v. Chicago Mys. Co.,

lifes no light allowed an advise and a contract special self avenue at the opens of about the to select tour hear. -c. . Fire thi at tree out bathaltal book sade shalowed hims fondent mays that police officers could see the care on the pressing when at a distance of 190 fact. The inference is that if: Lauer chould have seen thou. Whis he workin since at the time ofreduce any sure to misur our deadloss our to sures our boyely aresit source the etreet and at a stanistill. The headitght on the sugne that introops off factorings arona of sade smituages and earliest the train visible. Sien, there was a quellible on the equal car of at apices as they are reached. The latters week by service and the attent to man the approaching automorphe, as we have the sold, bad a small electric bulb, and there was evidence from which ness and even too bluss it rais bevoiled send lies this you! add by or, Louer under the chromatasces in the exercise of due cure. topos has latellucture and that has algebrase and fi were neglected improbable. Meradon gives as evidence tending to show not ligence on the park of dr. Lauer, with the execution that he have on driving and parliamed and inverse to mean of another a de galancee and browns . wid to been nitroi our reme language of II . where the appropriate the contract of the contr even blues als second to the fair to arreste a bad of it is choyped. The cases are all to the effect that the question of centributory negligenes, under such eirenmetences, is for the jury, rellrend exceeding is, of course, known to be dinversus by every yersen of expertence. The cases say one approaching a uresitag fir is fon al il dans was cold access out the motali ban hool binome times and under all einconstances regligent set to do re. Terr all tim elrequetances so to the physical elfuction at the crossing, the condition of the weather, the location of the train, etc. aust he taken into consideration. The following cases justify a holding the ten consistent of Lance's consistency incitioner, if no, or Der Tier James - Tannana V. 1259 of COLDANA, Let 121, 104, 1011 5, 8 5.

305 TH. 100; <u>letere</u> v. <u>Chicago Avs. Co</u>., NOT INL. BOD; <u>Deary</u> v. <u>O. C. S. S. L. Av. Co.</u>, The INL. Ele; <u>Coulter</u> v. <u>L. C. . . . So., 264 TH. 414; <u>Taylor</u> v. <u>Alton b. satern A. E. Co</u>., 255 TH. App. 292; <u>Capalo</u> v. <u>Jrané Trunk Western v. Co</u>., 203 TH. App. 06.</u>

It is further contended that the court erred in modifying defendant's requested instruction "o. 6. This instruction efter stating the rule of law applicable to contributory medicance contained this further sentence --- The natural instinct of sairproservation does not give rise to any presumption that the deceased was using due care and daution for his own safety. The court refused to give the instruction as tendered and sodified it by striking out this last sentence them gave it as modified. The defendant argues that as there was an eyesitness to the applicant (the bruke an. Herndon), the presumption of due care did not obtain and office Goodman v. Chicago & s. I. My. to., 248 111. Mr. 181; Devine v. Chicago City My. Co., 188 III. App. 858, 568; and small v. J. C. & St. L. Ry. Co., 981 Fil. 908, 810. Defendant mays there was no evidence whatever of the habite of the deceased as to prudence or the exercise of care and caution in the ordinary affairs of life or any other fact throwing light upon his exercise of ordinary care at the time of the accident, and that there was, therefore, no basts in the record upon which the presumption of due care srising from the natural instinct of self-preservation could be based. As a matter of fact, in no place in the trial of this cause, so far as the record discloses, did plaintiff contend or rely an any presumption of due care arising from the natural instinct of selfpreservation. To such rule was contained in any instruction given at plaintiff's request, and this matter, in so far as it is in the record, is injected by the objection made to the deletion of this sentence from the instruction.

In instruction No. 13, given at the request of plaintiff, the jury was clearly told that while the law did not require of plaintiff's intestate an extraordinary degree of care for his own

entities to further but the reget error to meditate defendant's requested inversation is. S. This inchestion often cond consultion customythem of alfanting and to also my guipers while to regime! Despite all over security coffur and basis becared, and I wit notification one as at sair ovin You seek notification and mes using one care and contion for his our safety, " The court ::ingularis by the training the condense of an experience of the conditions out this last sentence them pays it as mailflad, the defending with as there was an egovituees to the accident (the brahemme, Margaden), the procumption of due sere did not obtain and eiter Section v. Didago A S. J. Pr. On. had III. Jul. 185; pertie v. 168 TIL. App. 886, 888; and Herell v. C. C. C. . l. iq. So., 281 111. 505, 210. Corentant cays there was no to constate of an hermoten all to official and to cavalant constitu will to eristing qualities his the original of the control of or any other fact throwing light toon his energies of ordinary care st the time of the accident, and that there was, therefore, as had t in the record upon which the presumption of due core arising from in al .head of bluce mottevere-Ties to faniful later and end nathing of foot, to be place to the latet of this cours, to for an the record discloses, did plaintist content or rely on any prowilling of the sale of the little From the subsect invitions of saidevization. No rack rais outcined in any instruction river at plaintiff a request, and this matter, in se far as it is in the passed, he hapened by the shipswise and as too deletion of very

instruction to. 12, given at the request of plaintiff, the jury wes slearly teld that while the law dis not require of

eafety, it was required of him and his next-of-kin that at and before the time of the injury ardicary care should be exercised. In view of all the facts and disputations shown by the proof, and that that was ordinary care would depend upon the discussionness of each particular case, that it was such care as a person of ordinary produces would exercise under the same or similar stroughtanous. In other words, plaintiff tried the case upon the theory that it was incombent upon him to prove the exercise of ordinary care by the deceased. We held the court did not err in so modifying this instruction.

It is urged that the court erred in its ruling upon the admission and rejection of evidence and in particular that it was error to admit in evidence Exhibits 1, 0 and 3, being photographs of the railroad crossing at which the accident occurred. Here were testimony before the same were admitted as to seen and every one of them that it was a correct, adequate and proper representation of the place where the accident occurred, and this by several witnesses. The claim agent of defendant, who had been familiar with the crossing for twenty years and who testified, made no statement tending in any way to show that the photographs were not fair representations of the physical situation at the crossing when the accident occurred. There was no error in this respect. From lie v. Brownlie, EST III. 117; Feople v. Barbert, 361 III. 64.

Over the objection of defendant the court ressived in evidence a certified copy of the weather report of the meather Sureau of Chicago for the month of November, 1937, from which plaintiff read to the jury information shown on the report for the day of the accident, November 20, 1937. Defendant objected that the report of the seather Bureau at Chicago was inadmissible to prove weather conditions in Chicago Neights, twenty-seven siles away, and how contends that the court erred in allowing the same in evidence, sitting Mandfelder v. most side levee District, 194 III. App. 263, where records of the centher Sureau of it. Louis, Riesouri, were held

sufery, it was required of the and his contents to exected before the time of the injury criticary sure energia to exercised in view of all time foots and circumstances observe by the proof, and the view of all time foots and circumstances of the files and creates of the circumstances of some particular care, the new of the care as a person of criticary and an other mode, plaintiff tried the case upon the through the test to the through the tried the case upon the through the tried the case upon the through the tried the case upon the through the time cause of customer case by the decreaced. We held the cause of customer case by the decreaced. We held the cause of and the constitute this

It is arged that the sourt erred in its rains and the addission and rejection of victors and rejection of error to edula the evidence included 1, I and 3, being photographs of the religeous the evidence included the accident accourse. There was testiment, before the sume error admitted as to each and every one of them that it was a correct, adequate and respectmentation of the place where the accident, adequate and this by several vitaminances. The claim appet of Astendamt, who had been tentitud with the accessing for treaty years and she tentitied, ands an etalement the accessing for treaty years and she tentitied, ands an etalement the accessing the physical either respectation of the physical either the physical error and the representations of the physical eitherton at the creating when the accessing when the physical either the physical at the creating when the accessing when the accessing when the

Over the objection of defendant the court received in evidence a certified copy of the meather report of the mather hursen of the tention plainmanes of the acoldent, from the plain of the acoldent, however 20, 1947. Defendant objected that the report of the vestmer fureau at Thisego was installed to prove aster contitions in Chicego historie, twenty-seven miles seey, and now contends that the neury sread in allowing the same in evidence, stating Energy is in thing Interference.

inaddicable to prove condition in Endicon county, Illinois. These was positive evidence by Mr. Baker, a police officer of Chicago beights, to the effect that on the alaht of the accident the save-assi was isy and the misht cloudy. To think the evidence as at-aissible as tending to show the state of the conther on that day. Chicago a Borthwestern Nr. 2. v. Traves, 17 Ill. App. 136. The Handfelder case, on which derendant relies, is only abstracted but it is apparent from the abstract that the issue in that case concerned the quantity of water, which at the time in quostion are being drained from the land from a remate point of the county, and the appellate court beld that the it. Leuis contact report was not compatent proof as to the particular quantity of water falling in the City of East at. Leuis, Illinois. To hald the court did not err in the admission of this evidence.

to care which at the time in question were in and about the crossing but not attached to the train which the empine was public. The fendant objected upon the ground that if the purpose of this evidence was to bring out the fact that other care standing on adjacent tracks would obstruct the view of the crossing to one approaching from the north, there was no allegation of negligence in this respect in the complaint, and Suckley v. Mandel From., 122 III. 200, 370; Miller v. C. & S. **. Sy. Co., 347 III. 407, 402, with anderson v. C. A. I. & F. Sy. Co., 243 III. App. 327, and Orben v. Jack Mandelto Ay. Co., 106 III. App. 132, are cited. The evidence was admissible for the purpose of showing the general cituation at the crossing although not particularly alleged as negligence in the complaint.

C. & E. I. Ry. Co. v. Beaver, 199 III. 34.

It is urged here, as in the companion case, that the damages awarded to plaintiff are excessive. As we pointed out in that case, however, where there are lineal descendants the law

institute, in prove contitions in cation county, littleder, Tourse of the actions of thicker of thicker of the peak position of the selection of this property, to the selection the property on the sign of the selection of the selection of the selection on the lay, and the selection of the selection of the selection on the lay, the selection of the selection in the selection of the selection state that the selection of the selection selection states and selection the selection states and selection the selection of this selection is held the count distinction of this evidence.

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To her which at the time in question were in cas about the ereceipy to entre which at the time term in question were in cas about the ereceipy but not elemented to the train which the entire was pushing. So, was to bring out the ground that if her purpose of this evicence was to bring out the fact that other sere steading or edjacent tracks would obstract the vice of the ereceipy to end approaching from the north, there was at allegation of negligation in this rate of the fact of t

It is usyed here, or in the companies once, that the interestive, as we pointed out in ver, where there are limit descendants are les

We find no reversible error in the record, and the judgment will be affirmed.

JUDGHERY AFFIRMED.

O'Connor and MoSurely, JJ., concur.

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LAURA S. K. SLOCUM, A. CORN and HERWIN M. MART, Appallants.

FIRST NATIONAL BASK OF CHICAGO,
JOHN C. MEINERS/and JOHN C.
PARTHIDGE, individually and as
members of a Jondholders' Petective Committee under a Deposit
Agreement dated December 31, 1931,
A. HARRIS, A. ACTUECHILD, M. B. BANK,
SICURITY PATIONAL BASK OF SUBDOYDAN,
SICONDIN, as Trustee under the Last
Will and Restament of Joachim Johann,
and A. C. ALYN & GO., a Beleware
corporation,
Appelless.

COOK COURTY.

305 TA. 488

MI. JUNTICE MERUCILY DELIVERED THE COUNT.

defendants with conspiracy and fraud in connection with the headling of bonds evidencing mortgage indebtedness on cartain real estate and asking for an accounting and other relief; the matter was referred to a master who took evidence and reported, recommending that the amended complaint filed rebruary 1, 1839, be displaced; the chancellor approved the report and sustained the motions to displace, and plaintiffs appeal.

The Ashland Industries Building Corporation on January 1, 1925, issued its first mortgage 6 per cent bonds in the principal sum of \$1,500,000. These bonds were secured by a trust deed from the Ashland corporation and Maurice Rothschild, one of the defendants, to The Foreman Trust and Savings Bank, as trustee, conveying real estate properties and pledging \$456 shares of \$100 per value preferred stock of Marris Brothers Company, a Delaware corporation; the trust deed provided a sinking fund to be used for the retirement of these bonds; they were also secured by a guaranty agreement executed by Maurice Rothschild and four other guarantors (two of whom are now dead). This agreement guaranteed the payment of the principal and

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305 I.A. 488

IN. JUSTOR MORNETLY INLIVED THE CRISICS OF THE COULT.

defendants with conspiracy and fraud in connection with the handling of bends evidencing mortgage indebtedness on certain real estate and asking for an accounting and other ralles; the matter was referred to a master who took evidence and reserved, recommending that the sacendades complaint filed February 1, 1970, he dismissed; the chancellar arm proved the report and esetained the wetlane to dismins, and plain.

The Askland Industries Bullaing Corporation on Jamesy 1, 1256, issued its first mortgage d per cent bonds in the principal sum of el. 500,000. These bonds were accured by a trust deed from the debland corporation and Saurice Enthcohild, one of the defendants, to The Foresan Trust and Cavings Bank, as trustes, conveying real cetate properties and gledging Sais charge of alot par value prover red atomic of Harris Spotiant Company, a belavere corporation; the trust deed provided a cimilar fand to be used for the retirement of these bender they sere also secured by a guaranty agreement enough.

interest on the bonds, upon the condition that whenever the principal amount of bonds outstanding was reduced to 1,000,000 all liabilities under the guaranty were terminated and the guaranters discharged. The Foreman bank, as trustee, was later replaced by defendant first National Bank of Chicago. The bond issue was reduced by exyments to \$1,143,200. January 1, 1932, there was a default in the payment of interest and also defaults in the payment of taxes for the years 1928 to 1936, inclusive.

A bondholders' committee was formed to handle the situation under an agreement dated December 31, 1931, and approximately 90 per cent of the outstanding bonds were deposited with this sommittee: January, 1936, pursuant to the request of the committee, the First National Bank, as trusted, offered for sale at public suction the Harris Brothers Company stock pledged under the trust deed, which was purchased by the committee for \$2500 and the proceeds distributed to or held for the bondholders. In 1936, proceedings to rearguaize the Ashland Industries Building Corporation were instituted under section 77B of the Bankruptcy Act in the Federal Court for the Forthern District of Illinois, and a plan of reorganization was submitted and confirmed in that proceeding on August 2, 1938. At the request of the committee and because of the pendency of the reorganization proceedings, the First Mational Bank, as trustes, refrained from instituting proceedings against the guaranters. Maurice Mothschild, one of the guaranters, offered to the trustee 143,200 of sutstanding Ashland bonds on condition that they be canceled and the guarantors released. The trustee refused this offer because of an ambiguity in the provisions of the trust deed and the guaranty agreement with reference to the trustee's powers and authority to accept this offer. In 1938, pending the reorganization proceedings, the Security National Bank of Sheboygan, owner of 19000 of the bonds, demanded that the First Mational Mank, as tructee, institute legal proceedings against the guarantors. This demand was refused by the trustee.

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inforest on the boods, upon the condition that the principal amount of bonds outstanding was reduced to 1.000,000 all liabilities under the guarantes discharged. The value the guarantes discharged. The Powers bank, as tructes, and later replaced by information of First Astional bank of Okisego. The bond laws was reduced by reparts be 1.140,000. Jensey L. 1800, there was a default in the papers of interests of the season for the guarant of interests of the season for the guarant of the season for the guarant of the season for the season for the season for the season for the guarant of the season for the season for

maitastia sur sincer of heart and motifiamed intollection A under an agreement duted betraviter St, 1861, and appropriate 98 page ingitimen aids with beitaugh com shood palinadeses add to does lanuary, 1606, pursuest to the request of the committee, the first Mational Lank, as trautee, effered for sale at public avetien the Sarets Sewiners Sourcey where placest under the front med, ented und purchased by the consistes fer 10000 and the process distributed a or hald for the homenalders. In 1900, promostings to reorganize the married whom Saturdians were uniformation saturation saturated Sunface principled and had read Dreaded and all the publication will be less District of Illinois, and a lice of reargnession was established and confirmed in that proceeding on bugget t, 1800, it the younget of the countries and because of the pendency of the recryalization ura--of pay harings, our pays, as the last barrens the Theorem ettuting proceedings against the guaranters. Marrice Methadild, one of the guerestiess, offered to the trustee side, 200 of suterending deliand bonds on condition that they be conceled and the pourmitter at throughout to to expect this erick which because of the beautier the provintens of the trust deed and the surrents and to anciety of reference to the true see's powers and authority to need the offer. If there, couldness the bounded parties proceedings, the bountless and Bantanal Munk of Maboggon, owner of 19800 of the bends, decuaded many was where to those the bearing and their bearing the page against the guaranters. This decad ma refused by the trustee.

May 25, 1938, the Sheboygan bank brought suit in the Superior court of Cook county egainst the three surviving guarantors and the First Fational Sank, as trustee, seeking a money judgment against the guaranters and an order enjoining the trustee from accenting the tender by laurice Wothschild; the trustee filed its answer to this; subsequently, and before hearing, the heboygen benk filed its emended complaint, reciting that since the commonement of the original appeading it had investigated the financial condition of the guarantors and now believed it to be for the best interest of all concerned that lotherhild's tender be accouled, and asked for an order directing the First Estional Sank, as trustee, to accept this offer, cancel the bonds and execute a release to the guarantors. The Sheboygan bank was a non-depositing bondholder and its suit was a olasa suit: its amonded complaint set forth the bond in ur, the guaranty, the financial condition of the guaranters, the Nothschild tender and the ambiguities touching the authority of the trustee in the trust deed and guaranty agreement. Plaintiffs say this was the result of a "secret deal" and part of a school that the Theboyees bank would "about face." An answer was filed by the First sational wank, us trustee, asking for directions of the court. The other defendants also answered, including the bondholders' committee, recommending seceptance of the Rothschild tender.

August 8, 1938, a decree was entered finding that the acceptance of this tender was for the best interest of all the bond-holders; that the trustee had authority to accept it, cancel the bonds offered and release the guaranters, and the decree directed that this be done.

Case was filed by plaintiffs Florum and John, asking that the decree of August 5th be set aside, and also asking an accounting and a money judgment against the guarantors and that the sale of the Marris Drothers stock be set aside; this complaint, on metion, was stricken.

February 1, 1939, the present amended complaint was filed,

bay 15, 1976, the chelogram hash brought satt la the Augerlan court of Cook county against the three enrylving quaranters the Phys. retired hour, as thursten, resident a passific fully and has against the guaranters and an arder exjeining the tranter from ancopring the reader by Mouries Assissible; the trustee filed its messer he bits; subsequently, and helper bearing, the undergon bear tiled the emerged words int, restitut that eines the communication neilibnes feinnail of heightered had it palescory inninies of To the years and and out of it haveled you has another and to all concerned that hotherhild's tendow be ecosysed, and belied for an order directing the First bettenni Benis, as treature, to accept this offer, censel the bonds and erecute a release to the parentage. The a new Five will been well-followed and Longity-stat in how lived responsibility SAME HARD AND SHOULD SERVICE OUT JUST THE BOOK SERVICE. THE guarant, the financial condition of the guarantars, the hothering be referred and the arthresisting the authority of the trueter in the trust doed and gommanty egreenent. Plaintiffs may tale was the dead copyrided and take evolve a to from hear from forces a to these . ina longite. taril ont yet half any toron mi " .cook funda" bluow as trueses, asking for Alrestions of the court. The other defendants the named, beduing for hashablers or paliculation of several and ceptames of the Estimateld tender.

August 2, 1935, a decree was entored finding that the secretions of this benimber the book interest of all the benimbers; that the trustee had authority to accept it, cancal the bonds offered and release the guaraneurs, and the decree directed that this he done.

September 7, 1574, the original complaint in the present
judgment syninet the guarantary and that the sale of the Hapris

February I, 1918, the erosent suspend commission of the

asking that the decree of august 8, 1936, be declared mult and void, that the trustee and the members of the boadholders' committee be removed and held for melfeasance and misfeasance and that a money judgment be entered against the surviving guaranters. Sefendants filed motions to strike, which were sustained, the trial court apparently being of the opinion that all the matters set up in the amended complaint had already been heard and decided by two courts prior to the institution of the present proceedings.

Plaintiff Sloous is the owner of \$2000 of the bonds:

plaintiff Sche owns (800 of the bonds, and they 21d not deposit their

bonds with the committee; plaintiff Mart deposited his bonds, ag
gregating (1200. Flaintiff Tlocum had brought suit against

Rothschild for the non-payment of the interest, and on sectember 27,

1937, had judgment against mothschild for (884.1), which was affirmed

by the appellate court in blocum v. Harris, 206 ill. app. 367, and

leave to appeal denied by the Supreme court.

Brothers stock pledged under the trust deed to the bondholders' consistee for \$2000; this stock was sold at public auction and the proceeds applied on account of or held for outstanding bonds. The amended complaint contains no allegations as to the actual value of the stock or that the sale price was less than the value or that the trustee was without power to sell. Moreover, this sale was fully described in the Federal court reorganization proceedings and after evidence before a master and hearing by the court the sale was confirmed. All questions with reference to the action of the trustee in connection with the Harris Brothers Josephany stock were finally determined in the Federal court, and its conclusion is a bar to the plaintiffs' claim in this respect.

The amended complaint charged fraud in accepting the tender of Rothschild of \$143,200 of bonds and releasing the guaranters. The guaranty agreement provides that upon payment by any guaranter of any amount pursuant to the guaranty agreement he became entitled to a

eating that the derves of degree 3, 1936, he declared milt and void, that the trustes and the members of the hardholders' consists he semested and held for milterence and alsformers and that a sempy judgment he entered equient the saviving guaranters. Defendants filled motions to strike, which were sustained, the trial court expandely being of the opinion that all the matters set up in the anended confidenced by two courts are to the lastification of the greenal proceedings.

Haintiff Cohe ower 1800 of the owner of 1900 of the beads;
plaintiff Cohe ower 1800 of the bonds, and they die not deposit their
bonds with the counties; plaintiff Mart deposited his bands, agpreparing 11800. Fishetiff thrown has arought mit applied
Rethenhild for the non-payment of the interest, and an Deptember IV,
1837, had judgment against Nothenhild for 1886.18, which was affirmed
Loave to appeal denied by the Supremy court.

Figure stock plodged under the brust deed to the herdelders' and alther for (2006; this stock was sold at public austion and the presentive sepplied on account of or held for cutetanding books. The seasodes compaint contains no chiesetiens as the time actual value of the stock or fine the price was less than the value or that the tructes was mithout power to sell. Forever, this cale on that the described in the Tederal court vergonization proceedings and after described in the Tederal court vergonization proceedings and after firmed. All questions with reference to the action of the tructes in the dearth of the solice of the tructes in the state the tructes in termined in the farmic Stockers Company stock were thally determined in the factor and its conclusion is a bar to the

of Rotheckill of 1145,760 of bonds and releasing the guaranters. The

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lies on the trust counts to the extent of such payment, but subardinate to the lies of the bondholders. Notesially has sequired #145, FOO or bonds and tendered them for cancelation in grass to reduce the mortgage indebtedness to \$1,000,000. If this offer was accepted Rathschild would necome a creditor of the martgage debtor, but subordinate to the claims of the bondbolders. It was while the question of the authority of the trustee to accept this lenier was pending in the Federal sourt that the mesoyma bear riled its suit asking for a money judgment against the quarantoys and for an order enjoining the trustee from accepting otherbild's offer. The conceholders' committee filed its petition in the adoral down and in its authority to access in the state court proceeding and to seres to the compromise offered by sothechild. This are referred in the Yederal court to a master and evidence was introduced as to the financial condition of the quaranters. The moster found that sevent Harris, one of the guaranters, had died in 1930 and his set it had been settled before there was any default in the sortange under consideration; that D. G. Harris, another autronion, had died in 1 3 , leaving no assets other than insurance ; yeals to his family; that the committee was unable to find any assots of a. Barris, another guaranter, and that U. . laur, shother guaranter, and could asset and large liabilities: that the only one of these guaranters with assets was sothechild, who had large limbilities, so that sail against his would probably result in man ruptey. In another reported, recommending that the consistee accept atmondist times, as it was so ordered. There is no evidence of freed or conspirace, but the order was entered only after eareful consideration.

court of August 8, 1988, is no bar to this action, so that assess was procured by fraud and collusion. The Sasboygan bank's monded complaint was filed on behalf of all bencholders and severted that after an investigation of the financial condition of the surrenters

Head on the time's estate to the extent of the east, and sele-Law to the live of the fundical description of the section -or of rebra at authors, as not small breaked has cheed to Cot. This dues the westgungs indebtedness to 11,000,000. If this offer and refer a traffice for to testings a second birey billion of the second but somerained to the claims of the bondheed. It was while the say tolard sidd byenn at before the to the milita off to meltings Fine and Laif's small respectate all family from fareign and at mailing value on my life traduction and Panlage receptor, passes a red parties as any out of the artists of the control of the control of unifer from farence at a maistre out natification for abled series of fine bulbleboom, Tubes upare out in the us of the first and to the competed affected by Lethernich. Itis you well read in the air of an immaharial and administra but contain a of Juneo Larabet Description of the participant of the building Library had so the sim had the in the disk property of the and mis set to but tellow experience the and include the new tenter being by the course elleration; that I. a. Harte, and that fourancer, had dea in 1986, Description of the property of the property of the state of the property and the countress one wardle to find ser secret of a largie, another STREET, LIST DAY TO THE TARRY DISTRICT, AND THE PARTY AND THE PROPERTY. milw and interest to a second to a second the state of the second with assets the deckeralt, who had large lightlities, and that rait wpalled him would profit to residently. The matter related to the tellar reson anding that the committee accept anthorized the tender, and mas se ordered. Vante le ne evidence of front or conspiracy, but and the color of the color of the billion because the color and

Plaistiffs next complain that the device of the "uporter seart of device."

Seart of August 3, 1839, is no ben to this action, as that dearest as propored by freed and collected. The Theorem bears and seconts that

I int was filed on behalf of all bondholeers and seconts that

and havestigation of the financial condition of the gueranters

it was the opinion that kothschild's tender chould be accepted. & decree to this end was entered in the Superior court, Nothschild's bonds were accepted and the guarantors released. It appears that both Bart and Slocus knew of the pendency of these proceedings; neither, however, made any attempt to vecate the decree or appeal from it; Bart, as a depositing bondbolder, was represented by the committee. The decree in the Superior sourt of the superior sourt decree but was interest after plaintiff had love of the superior sourt count in its decree that the suit was brownt as a discussion of the superior source. In the suit was brownt as a discussion of the superior source in its decree that the suit was brownt as a discussion source in its decree that the suit was brownt as a discussion source moved to vacate or appeal.

No facts are shown supporting the charges of fraud and collusion. It is too well estiled to require extended elistics or sutherity that were conclusions as to fraud are not calliciant, but that facts must be shown. Harrians v. County of morie, 10% ii.

36; Insus v. Chicago Title & Trust Co., 100 Ill. 55%; flau v. lank, 305 Ill. 154. The superior court had jurisdiction of the sheboysen bank suit. All parties were in court and were represented by mobors of their respective classes and by the trustes. http://doi.org/10.1000/11.236.

The instant proceedings are in the nature of a bill of review, which must be brought for error of law apparent on the face of the decree and cannot be made to function as an appeal of will of error. Regner v. Hoover, 318 Ill. 169.

cf the trust deed with reference to the authority of the trustee to accept the bothschild bends and that the setion of the trustee in this repart was improper. Examination of the trust deed (sec. 15, art. 5) shows the trustee was suthorized to accept and receive in satisfaction of the mortgage debt "such amount and amounts of money as the trustee in its unlimited discretion may deem advisable."

it was the equation that hermanifely comply to section of the decree to this end we embered to the finerior endry, "emportate beth hart and leader been of the gentessey of these proceeds. The beth make to vector the deares of a set and from the feart for the deares of a set and from the feart for the feart, we represented by the semiliar committee. The deares in the "operation court end and the entered but was entered with plaints for investments of the fine feart for the twenty for the fine from the fearth of the fine feart form all the deares the third the terms of the terms of the fine fine the thirty of the terms was antered to the fine fine the fine that the deares the total was a discusting the total all

to finished. It is too coll notibely to require of front and colinated. It is too coll notibely to require election of the coll notibely to require elections at the front are not collision, but that facts must be shown. Harrison v. County of French, 125 111.

103 111. The largerier court had jupithistion of the Amborgun bank cait. All parties year in court and very represented by sealong that their respective classes and by the trustee. While w. Harrison.

The instent proceedings are in the values of a bill of review, thich must be brought for error of lew apparent on the face of the decree and seasot be made to function as an apparel or writ of error, course v. 100 cer. 211 111. 165.

Plaintiffs organ that there are no ambiguity in the terms of the trust deed with reference to the authority of the trustee to accept the softential bonds and that the action of the trustee in this report to a layrager. Translation of the fract deed (sec. 13, art. 5) shows the trustee was authorities to accept and receive in those the trustee was authorities to accept and receive in them.

find no language specifically authorizing the trustee to accept bonds in compromise of the guaranty. A certain amount of discretion was lodged in the trustee by the terms of the trust deed, but there is no allegation that this discretion was not exercised honestly and fairly.

It is said the trustee permitted defaults in the payment of tames, but there is no allegation that the trustee could have avoided these defaults or had any money to make such payments. There is no allegation that any more could have been realized for the bencholders if the trustee had instituted foreclosure proceedings. The committee, representing 90 per cent of the autstanding bands, was of the spinion that acceleration and foreclosure were insidvisable. The complaint does not suggest that any greater benefits for the bondhalders could have been had than was obtained by them in the reorganization accomplished in the Federal court.

Industrious and astate counsel for plaintiffs have resented a large number of points and citations which would agree consulty extend this opinion to comment upon. "It is just as important that there should be a place to end as that there should be a place to begin litigation." "Italy v. Lottlieb, 705 U.v. 165.

opinion, the orders of the Superior court sustaining the motions to strike plaintiffs' amended complaint and dismissing it were prepar, and they are affirmed.

AFFIREED.

Matchett, P.J., and O'Connor, J., concur.

find no lenguage resolfically authorialny the trustes to accept bonds in comprovise of the quarenty. A pertain summe of dispetion was lodged in the trustee by the terms of the trust dead, but there is no allegation that this discretion was not exercised beneatly and fair-

It is each the trustes permitted defaults in the payment of taxes, but there is no allegation that the trustes could have avoided these defaults on had any money to make each reguests. These is no allegation that any more could have been realized for the beneficidary of the trustee had inetituted forceleaure proceeding. The consisting septementing of per cest of the emtetanding bands, was of the opinion that acceleration and forceleaure were inadvisable. The complete that confident could deed not engaged that any greater boundits for the benchminestion are have been had then was obtained by them in the recryaniustion are

Industriant of polute and elections which would unreasonably entend this opinion to comment upon. "It is just as important that there should be a place to end as that there chould be a place to agen litigation." Stoll v. 1350isby 206 U.V. 136.

so have presented the effirmative rescons shy, in our epinion, the evidence to strike the bettene to strike lateral time sections to strike lateral sections to strike the lateral sections and the lateral sections to strike the lateral sections and the lateral sections to strike the lateral sections are sections to strike the lateral sections and the lateral sections to strike the lateral sections are sections as the lateral sections and the lateral sections are sections as the lateral section are sections as the lateral sections are sections are sections as the lateral sections are sections as the lateral sections

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Matchett, F.J., and O'Connor, J., concur.

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VERCHICA M. MoINEANEY, as Administratrix of the Estate of Kichael J. MoINEANEY, Deceased.

Appellant,

I the Unit .

BOYBER BAKING CON ANY, A CONTINUEN, and EUWIN S. KILLEGO.

1 3 05 I.A. 489

MR. JUSTICE KOSURELY RELIVERED THE OFINION OF THE COURT.

Wichael McInerney, while driving his Ford our westward in Cernak road in Chicago, collided with a truck soing contained belonging to defendant baking company and driven by the pe-defendant,

Edwin 5. sellong; as a result of the cellision referency reastred injuries from which he died; his administratoric because it was a sense the owner of the truck and its driver, alleging that asserney was exercising due care but that defendants' truck was as carelensly and negligently operated by asllogy as to cause the callision; the case was tried by court and jury and a verdict was returned finding offendants not guilty; motion for a new trial was aversuled and judy-ment entered on the verdict. Plaintiff appeals.

panifest weight of the evidence. The accident appeared about 3 o'cleck on the scrain; of July 14, 1877; with consequence about 5 o'cleck on the scrain; of July 14, 1877; with consequence in his car were arthur took, andrew Bruby, Jr., and Joseph Jacks, all applayees of the Link Selt Company; on the evening of July 13, they had attended a meeting of the officers and employees of this commany at 53rd and Malated streets; after the meeting, 'cinerney with his party first went to a downtown restaurant on Ven Buren street near litate, where they had something to cat; they left this place at about 3 o'cleck on the merning of the leth and proceeded hoseword. They drove south on State street and were stopped by a red light at German road, or 22mm street; when the green light came on they turned west on German and hed gone about a block - that is, opposite



VERNICA A. Melle Mais, of Malacrosoft)

of the leave of Machael J. Melnerescy,

iii at the management of the management

Michael Valloque, while dering his ford our sections in Jermak road to Valcage, collised with a truck guing costumed belonging to defeadant beating seepany and driven by the collision Valloque, received that a Balloque, as a recult of the collision Valloque, received the owner of the truck and its friver, alleging that electron was exercising due mare but that defendance truck are so careleasly and madigness that collision the core and tried by court and jury and a version was returned fracting to the trading to version was returned fracting and formants and surface that collisions are continued to the version and returned fracting on the version of the state of the second.

manifest veight of the seldence. The socious happened about I o'clock on the sorning of July la, herry with Mainersey in his carver arthur home, andrew Hraby, Jr., and Joseph Joses, all exployers of the Link solt Company; on the evening of July 10, they had at tended a mosting of the efficare and employers of this company at Jord and Haloted atrease; after the meeting, reincreasy with his party first went to a downtown restaurant on Van Suren state lear thate, where they had something to ext; they left this place at about 5 o'clock on the merming of the leth and proceeded homework. They drove south on the merming of the leth and proceeded homework. They drove south on the merming of the leth and proceeded homework. They drove south on the merming of the leth and proceeded homework. Servak road, or the street; when the green light came on they went on Cornet and hed more about a hight came on they went on Cornet and hed more about a higher came on they reset and hear a that is, or or or the sent had none about a higher and it, or or or the sent had none about a higher came on they reset and hear a higher came on they went on Cornet and hed none about a higher came on they are that it, or or or the sent had none about a higher a that it, or or or the sent and hear a higher a that it, or or or the sent and hear a higher a that it, or or or the sent and hear a higher a that it, or or or the sent and hear a higher a that it, or or or the sent and hear a higher a that it, or or or the sent and hear a higher a that it or or or the sent and hear a higher a that it or or or the sent and hear a higher a that it or or or the sent and hear a higher a that it or or or the sent and hear a higher a that it is not the sent and hear a the sent and hear

bearborn street, which runs north and south, when the collision with defendants' truck, driven by tailogs, occurrent. Servak road at this point runs east and west and is digitly over 30 feet in width; there are two street car tracks on Cereak, both of which at the time of the accident were on the north side of Jereak instead of the center.

rightiff makes the joint that as defendants' automobile was proceeding eastward in the east bounc car tracts, which were on the north side of German, it violated paragraphs 181 and 165 of the Motor Vehicle lev. chap. 95-1/2, Ill. Lev. Stats. 1537, which is effect says that vehicles shall be driven on the right side of the read, with certain exceptions, one of which is when the right half of the readway is closed to traffic while under construction or repair. That was the case pare. - relirond visited ordered were at about a block and a half west of the place of the collision. Ins pavement on the couth wide of Synak roud is coldely and of the viaduet had been torn up, leaving the two goved forthons of the street car treeks on the north side of the road the only space for traffic, and east bound traffic used the street car tracks. Defendants' truck was on the north side of Cornel read, not in violation of any provision of the Motor Vehicle law but because traffic on the south side was obstructed by pllines and tressels west of the viaduet and the torn up condition of the street suct for a short block up to the etreet car tracks, which, as as have said, were on the north side of Cermak road next to the north curb. . . orsover, counsel for plaintiff someeder that east bound truffic wight proceed on the east bound our tracks. MoInerney's car was proceeding westward, streddling the north rail of the sest bound street car track, while defendants' automobile truck was going easterly in the east bound street car tracks.

Plaintiff's theory is that as the vehicles approached each other defendant follogs suddenly and negligently turned his truck in a northeasterly direction, bringing it across the path of "Cinerney's car, causing the vehicles to collide despite "Cinerney's

Desrborn street, thick muse sorth and south, when the cellision with defendants' threet, driven ty lellays, accoursed. 'areal road as this point runs seat and west and is dightly over 25 feet in staint that point runs seat and west and is dightly over 25 feet in staint there are two street car tracks on Cornal, hoth of thick time of the accident were on the neuth side of Cornal instead of the center.

elidonotus tatualactes as tudi triog and andem Tivalsi'i me proceeding enchanged in the most bound our truckes william one the north and the til advantage, betaloty it flavous to able direct the Weter Wehlels law, chap. 95-1/2, 111. sev. Minte. 1987, saidh is nil to old tager od se never of Hade salelfor tade spac tooks road, with certain enceptions, one of which is when the right ball? or on believations water office office of peach of quotier and be pair. That was the case here A relieved visions opened agent and .moistifies and to souly one to your limit a bus should a buowle out to tean gletaibeani hear dennel to this disce out no incover vising had been town up, leaving the two payed fortions of the sel come gine and hear oil to make direct out as educat use feetle Courted and said board towers and her others now proof fine fine attents ante' truck was on the north side of Cerask road, not in violation er any provision of the heter Vehicle les hat because traffic on the and to form elected the valley of between one of the vising and the term up condition of the street east for a ringit block up to the street our tracks, wilch, as we have said, were on the north side of German read near to the north ourh. Horsoner, nessent four plaintiff cotoods that east reast belief up't Japanes en the east bound our tracks, deligrant to ear the proceeding westward, especially the morth rail of the sest bound street dan track, Price oil al L'Acctio palle une force elleureus "appainated allies senare van Juruly loved

Flaintiff's theory is the vehicles approximed each

defendant relign suddenly and negligently turned his truck

exity direction, bringing it across the path of

transported by temph whitten of actoridat put metamon

efforts to avoid an accident.

Jeaks testified that he was on the back east of the car on the left hand side behind colnerony; he may defendants' trush served to the left, outline right in front of collections assured; shall relarmey also everyed to his left and then the accident assured; he says relarmay's car was point not more than it allow an asur and that defendants' trush sucreed in its pathway when it we between 25 or 30 feet away; that colmanney sweeted to the right. Just Jeaks testified before the coroner's impulsy into colmanney's death a law weeks after the collision as said he could not tell how far apart the core were when defendants' car started to everys; that all as say were the lights in front of him and he fid not ass the arunk until the moment of the impact; that he could not my as to what direction Holmerney assume his automobile.

Hose testified he was sitting on the back seat of Moinerney's car on the right hand side and the only thin, he sould remember was that he saw lights in front of them at an angle, which appeared to be lights of an automobile not over 10 or 12 feet away when he saw them; that he was not paying any particular attention to McInerney's driving.

Welnerney; that when he first saw the truck it was an the west bound rail, close to the collarmay car; that the truck suddenly make a short curve, turning to the morth. At the coroner's inquest he testified he did not see the truck or its lights before the collision.

John Balvor, chauffeur, an independent vitness who was standing at the northeast corner of state street and ermak read at the time of the accident said he noticed the Ford in the west bound tracks and the truck coming in the east bound tracks; that he heard the sereching of brakes; that after the callision the Ford was up against the right hand side of the truck, which was facing in a southerly direction.

offerer to avelo waterelfont.

decire testified test in was on the best will all the case the safe to the last head side behind selected; he safe to the last head to the last, estains of last in fract of almostar's case that talmers y also meroed to his last and then the assident securred; he says "elected to his last and more than it also as nown and that defenders, true everyer in its justical about it we between that defenders, true everyer in its justical action of the case.

23 or 31 feet ampt that believely everyed to the right. Then itself the sector when defendents our started to everyet that all he am were the lights in from at his and to did not see the true and antil the sees the true and the did not say as to say an to that direction believely and the automobile.

ince testified he was elities on the book seat of.

Animorms to see on the edght hand cide and the only thing he could

reasonber was that he can lights in drond of them at an angle, which

symmetric to be lights of an animorbile not ever in or if feet owny

when he saw than; that he was not particular estention to

Evoly that when he first one the front seas, to the sight of Wolsevery; that when he first one the truck it was on the weet bound vail, close to the Malmermey ear; that the truck suddenly mede a short surve, turning to the north. At the covener's innuest he testified he did not see the truck or its lights before the collision.

etanding at the northeest corser of histe street and dermi reed at the time of the sections said he noticed the feet in the sect bound tracks; that he heard the screening of brakes; that after the collision the feet was up

James C'Leary, another chauffeur and independent witness, was talking to Halvor at the time; he said he heard the brakes screening and say the two dere come tagether; the whole of irst cay the two vehicles it looked to him as though "they were going where they belonged, and an appoint sast and one as all not in the car tracks. The truck was going east, straddling the east bound car tracks. Then disary remains the scene of the tocident the Ford was on the right side of the truck, "non-disary tracks and of the another of the sast and defendants truck swerve to order the north, her did like undertake to state what caused the collision.

to the accident prevention bureau; that he took labors as soon as the injured parties were removed from the Pord; that these show that after the collision the rear of the truck was entirely an the morth side of the west bound track; that the general direction of the truck was almost east and a little south; that there was considerable damage to the right front fender and sheel of the truck; that most of the damage to the Ford was to its right front side.

how the accident happened? The witnesses for plaintle and its general direction was almost east and a little south.

Vader such confusing circumstances the jury could only appoint as to the cause of the collision. Trey could just as

was talking to Malvor at the time; to maid he heard the brokes seventing and saw the two over tower that the tree seventher; that when he first that the velocity to looked to him to the they were paint over the they have not the tower to the that that the truck out the truck of the truck the truck that the truck the truck, "assed into the cite of the alded of the alddle of the truck towards the frame." Joins of these alteres at the order and the alded of the alddle of the truck towards the frame." Joins of these alteres at the order and the ald they and the order deserve towards the angle, and they and the angle.

forming to the restrict of the ans a police officer assisted formit to the following the first that the sent that the sent that the self that the sent the self that the self the the sent the assistant the self that the sent third the sent the sent the sent the sent the sent there were considerable damage to the front feather and dress of the truck that the sent the sent the truck the damage to the ford was to its right front side.

case to state what coursed the collings.

Now the accident happened; The nitherace for plaintiff are inhow the accident happened; The nitherace for plaintiff are inoverving to the left, but on cress-examination said it everyod to
the right; that he had a "histing recollection" of it everying to
the right. Note had a "histing trace hit the ford car "sideways"
on the right hand side. Malver says that after the collision the
truck was facing in a continerly direction. "Theory cays the root
nut on the right side of the truck hosed into the side" shout the
middle towards the front. Folice officer foyle tack pictures of the
automobiles offer the collision and ears these the town the rear
and the truck sad entirely on the moreh side of the court.

Wader such confusing circumstances the jury could only

and the same and t

respondily conclude that if the corl and not averyed have a wild have been no collision as to somelude that the surving of the Irmak caused the collision. It is not within the province of the jury to guese where the truth lies and wake that the foundation of a verdiat. In offutt v. Tolumbian aposition, 178 Ill. 170, the spinion notes that there are cases "where there may be come avidence tendies is some remote dagree to support every allegation, yet of too inconclusive and unsubstantial a character to be the foundation of a verdict. ' In Virginia & L. a. ay. Co. v. Have, Idd Fed. 148, 188, 18 was held that a case should never be left to a jury on a question of probabilities with a direction to find in accordance with the greater probability. 'To allow a jury to dispose of a case simply upon a weighing of probabilities is to turn them loose into the field of conjecture, and to have the righte of the parties determined by guess." In Hyer v. dity of Janesville, 101 sis. 371, the principle of law is properly stated. 'In a case like this is is insuspent upon the plaintiff to show by evidence, with reasonable distinctuess, how and why the accident occurred. "" To present two or more states of a case upon which a jury may theorize as to the real amos of the accident, putting one conjecture arainst another and interminia which is the more reasonable, somes far short of making a case. * * * An examination of the numerous authorities cited will disclose that the principle of law does not admit of question or execution, that where there is no direct evidence of how an modifient resurred, it is not within the preper province of a jury to guess where the truth lies and make that the foundation for a variet. " a are of the opinion that in the instant case, in the absence of any tonvincing evidence as to whether follogy, driving defendants' truck, or Mainerney, driving his own sutemobile, or both sections, brought about the accident, there can only be surmise. Courts do not sulet litiments in damages based upon guess work.

It is said that counsel for defendants was guilty of misconduct, with special reference to his argument to the jury. Upon the trial defendants' counsel had offered to place on the stand de-

than event however you had bun wit li buil aluinnee plineauer to a collistic to the second that the collision of the activities of the court coursed who collision. It is not altitud the revines of the ings to guers where the truth lies and sake that the foundation of a weptiet. In others or interiors to melities, its till out of alleges taken pi append acceptes and ad yes want equil equip acces ou broad full some remede degree to ourgest every allegation, get of ten incoma to nottaining and of allowed a faithfulled and are eviated vessist. Ta Virginia & C. I. Co. v. sart, led led. 168, 188, to to saiteam a se west a of their of gaven direct sace a fadd bied som probabilities at the attention to that in accordance atthe tile restar probability. " a silve a jury to dis or a a as a silve!" creat to blot? and eral sensi used mad uf at selfilledore to paletter sociation, and to have the rights of the resting the hat and the gueen. In the v. tity of Jacenyllle, 101 tte. 171, the ordnesiele personnel of 24 side and some a mit thereby the man to ayon the plaintiff to dies by evidence, with resonable distinctes. how and why the sections occurred. "" to greens to up may called ont to come there will at an animostic on the come and a ter socident, putting one conjecture abulact amethor and Saterminian which is the more reasonable, comes for chart of marine a case. * * * gudy areignib file betts telffrontum nuonomum od? to motioniante fA the principle of law does not pints of question or economics, that where there is an direct evidence of how an another courtwe, * * * wit aren's come or yout a to controve coupers and aldie for at it Brath lice and make that the Youndation for a versicat, " we ere of were the to seemed all the terms toutest and all their collections vinding evidence as to decime fellow. Erlying dafonens arush. or halnersey, driving his own automobile, or heth combined, broadle tolum ton ch siques , selette of Time sad Stait , inabicon add Thoda litigints in danages based upon cases work.

It is said that ocussed for defendants was sully of misconduct, with escelai reference to his argument to the jury. Toon fendant Relies, driver of the truck; sounced for plaintiff objected to his competency, which objection has court properly suchine.

Chap. 51, 52, 711. Nev. Stats. 1937. In <u>Solution v. Speis</u>, 285 711.

A.p. 73, we noted that this was sometimes called the fend Man's statute and that in more on vidence (2nd ed.), 575, ... 1006, c. a said this rule of incompetency rests on "some varue setaphor in class of a reason" and asks, can it be more important to save dead sen's estates "than to save living men's estates from loss by last of proof."

In his argument to the jury counsel for defectants referred to the defendants' inability to present to the jury Tellow's tostimony as to how the accident happened; that he had tendered him as a witness but plaintiff's counsel had objected as he was not competent, although plaintiff might have salved this objection and persitted the jury to have full information as to the occurrence. The cases cited by plaintiff in which the conduct of apposing bounded was criticized do not present a situation like this, and we know of no rule which holds that it is reversible error for counsel to refer to the fact that his appearant has by objections, although properly sustained by the trial court, prevented the jury free knowless all of the facts.

It is suggested that a certain instruction given at the request of defendants' counsel should not have been given. The instruction properly told the jury that one of the sethods of inspending a witness was to show that he had intentionally under a statement polar to the trial inconsistent with his testionny upon the trial with respect to a material matter.

It is axiomatic that the reviewing court should only grant a new trial, when the verdict is attached, when it is exainst the manifest weight of the evidence. All questions of fact were properly submitted to the jury, who saw the witnesses and heard them testify. Its conclusion was that plaintiff had failed to prove the allegations of the complaint by a proponderance of the evidence. We do not see how it can be said this conclusion is against the manifest weight of the evidence.

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Sandant Reliegy, Briver of the trucks counted for plaintiff objected to bie competency, which objection the count projectly matriced.

They. 51, (2, 111. Nov. State. 1967. In <u>ichaeron</u> v. <u>relia</u>, 365 [11. Opp. 19, ve noted that this was senstines sailed the "peak truts that was senstines sailed the "peak truts without (2nd ed.), 6679, p. 1008, had call this relie of incompetency rests on "come verse motaphor in time of a reason" and acks, Can it be seen important to save deal men's estated

In his argument to the jury counsel for deligation resident to the jury follows resting to the defendants inchility to present to the jury follows the testing as to the sent testing the sent testing a many as the modifier's acquest had objected as he was not competent, although plaintiff alght have waived this objection and cornitted the jury to have full information as to the courrence. The cases often by plaintiff in which the venture of operating counsel was criticized to not present a situation like this, and we know of no relia which helds that it is nevertable error for counsel to retar tale which helds the opposite or a situation of the fact that the operation of the fact that the opposite or and the fact from the trips all sentences the fact that the opposite had by abjections, although property of the facts.

If is suggested that a certain instruction given at the request of defendants to a sentent instruction given to instruction properly told the jury that one of the neckets of inpeoplish a witness was to show that he had intentionally and a statement prior to the trial inconsistent with the testimany upon the
trial with request to a material matter.

It is exioustic that the reviewing court about only grant a new trial, when the verdict is attached, when it is against the manifest welfers of the oridence. All questions of fact tope properly submitted to the jury; who saw the riversess and heard that the the conclusion was that claimfully had failed to grove the allegations of the complaint by a preparatement of the cyldence. We do not see how it can be eath this conclusion is

For the reasons indicated the judgment is affirmed.

Matchett, P.J., consurs. O'Connor, J., dissenting:

The recovery of Cornek read west of Jearbarn street was term up so that the east bound traffic was shunted to she north and could preced east only on the south or east bound street car trees. In describing the situation counsel for defendants in their brief cay!

*From the railroad right of way east to ederal treet (a short block) and south of the street car trees, the aspealt persent on Cornek Soud was torn up. This all formed a sort of lettle neet, and that all vehicular traffic on Jermak Soud was forced to the north side of Cornek Soud from Secret Street west under the vialunt. In fact, the automobile traffic was shunted by means of traffic control lines, onto the street car tracks at about the intersection of South Dearborn Street with Cornek Road.

The accident happened about where Germak road would be intersected by bearborn street. As Instruey, driving the matemabile was straddling the north rail of the cest bound track - the proper place for his to drive. The truck was being driven east, south of the tracks and swerved to the north on account of the soudition of the pavement on the south side of the street, as above state, so as to proceed east on the south street car track. Shen the truck swerved to the north, religency see the headlights on the truck and thought there was to be a head-on sollision and in an andsator to avoid it, turned his our to the south and the driver of the truck, with the same purpose in mind, turned toward the north, but it was too late to prevent a collision.

In this state of the record, I think the verdict of the jury finding defendants not guilty is against the manifest weight of the evidence.

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ion the reasons ladicated the jungment in efficient.

Johnson Life Attropie

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In my opinion the evidence above that the could perting of the routhers was torn up as the routhers east bound trustle was rounted to the north and sould promesed out the sait only on the could or real bound since the freez trust. In tennetiar, the situation counced for defoudants in their build rape from the sailrost right of may east to indeped trust (a minet black) and south of the ettent our tracks, the achief pareacht on black) and south of the ettent our tracks, the achief pareacht on dermail look than up. This all format a sort of bettle mock, so did of largest one theret are under the visites, in the largest of the track of the visites. In

The specient largement there Comes road would be introsected by Deschors size the Mainteney, Ariving the Automobile was streakling the north rail of the meet hound track - the proper place for his to drive. The speck me being driven east, couth of the tracks and everyed to the morth on account of the condition of the precess on the couth side of the street, as above stated, so as to proceed east to be sently etreet ear track. Then the truck to proceed east to be a newl-on collision and in an endeavor to the late to be a newl-on collision and in an endeavor to the late to be a newl-on collision and in an endeavor to the late to prevent a collision and in an endeavor to

jury fluding defendants not guilty is egainst the manifest velybt of the syldense. DEAN F. SLARE AND LAWRENCE A. PETERSON, Defendants.

On Appeal of Dame F. KLANG. Appellant. 305 I.A. 489

WR. JUNTICE MOSPERLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging that on october 31, 1986, in vaneton, illinois, deformants larr and starton assultantial that with violence and deliciously meet and sequeled him; upon the stiel special interrogetories are maintited to the jury sain shatter such defendant, respectively, maintionally and vinionally assulted and beat the plaintiff; such of these interrogetories are massered in the affirmative and noth secondars are found solity; starton has assessed ind to compensate for plaintiff's analysis and infaniant librar 500; exerson has bein his abount and infaniant larr alone appeals.

The defense was that plaintiff negligently drove his automobile into the automobile driven by plant, causing it to solline with another car; that plaintiff drove his car away from the scene of the accident sithaut living his name or address and that flar pursued plaintiff for the purpose of apprehending his and turning his over to the police; that when isfendant compelles plaintiff to stop his car and desanded that he return to the name of police station, plaintiff struck flarr and refused to so, charupen clarr used only such force as was necessary to arrest plaintiff and compel his to so with his to the police station is wanten, Illinois.

The evidence presented to the jury on behalf of plaintiff was contradicted in sincet every respect by that offered no benelf



THE SHOTER MACHES IN THE PROPERTY OF THE COURTY OF THE COURTY

Flaintiff brought suit elleging that as actaber 'i, 1976, special interpolation were submitted to the jusy seting whether and best the plaintiff; such of these interpolations we ensured in the efficiently and best defendants were found guilty; February was assessed along to companies for plaintiff's danger and dafendant flaps affice and defendant lass special.

mobile into the automobile driven by Clarr, namely it to collide with another cas; that plaintiff drove his ner ever that the sound of the asoldest without piving his name or address and that blass of the asoldest for the justoces of appropriate his cast to the nament police to the nament police.

In to go with his to the police station in Eventual, Illinois.

The evidence presented to the justos in Eventual of plaintiff

Sining on Amable doubt of the more weens transfer at herelf-indeed to

of defendant. Plaintiff was 51 years old, 5 feet 8 inches tall, weighten about 100 counce at the time of the accurrence. Defendant was 31 years old, seights; approximately 175 pauds. . he altercation happened on the morning of Uniober 31, 1936, on Maridan road mear loyes etreet in vaneton; this was "homocoming" day at dorthwestern University and traffic at that point was neavy; the care were parked on both sides of the expect, leaving only the two middle isnes for traffic; plaintiff had corned his our facing north on the sout side of the street, is frost of a group of fraternity coulde and invaitories there he was to seet his cousin's son, harias to beliand, to take his to plaintiff's none in slimette: after sombeliane ned gotten into the ear plaintiff drave out into the northbound lane ond mays that his pight year fender grazed the left year render of a car parked in front of them; they proceeded northward on meridin of the rate of 15 to 15 miles on hour; plaintiff says this say the only stcident in which he was involved.

Elarr mays he was in the northbound traffic lane when plaintiff suddenly turned his car late this traffic issessition notice and struck clarr's car, forcing it into the southbound lane and causing it to collide with a car coming from the north.

drove his car alongeide that of the plaintiff and grached into it is an attempt to force plaintiff's car to the ourb. I sabel's etrest - one-helf to two-thirds of a all- north of Noyes - derendant forced plaintiff's car to the curb. According to plaintiff's story, corredorated by solleliand, Elarr came around to the east side of plaintiff's car, opened the door, reached inside and probbed plaintiff by his jectet and named or dragged his out of the car. There is varying testimony as to what happened next, but the jury could properly believe that Elarr struck plaintiff several blows.

Plaintiff received a cut on the mone, both eyes over blackened, a cut on the forehead, a cut through the syelid, a swellen jav,

illet a cont i west f . his same to some Tribalite . Inches to weighly about like ounds at the time of the expurement of the entire was Il years old, waithing approximately LVC venues. The electrical to manufact on the marginer of Detailer EL, 1777, on the state of the mada mito a ta ta mananami as elib terrane el el comia secol Injurying and traffic at that said our convey the care were and animal we'l need sinkin or his give salvant, tords and to salie that no air san de no mar arter? the aid hadre ; but this infe toilland ef the error values of a mean a te Jacks of there's out to torder where he was to meet his eracin's rea, thering at heliant, the bid to "little to a cold threater as each of this is a side offer of the sunf barafifter are abit the event Titheless was edd etal nation a to gotter then fled out became, galant more thinks ald fall aves is madianal as benegroup behaviory good thould be thought was time all any sid was Thinkle tween me salie hi of il to ofer .Coviovel see of folds at thobis

Flare says he was in the negtibous traffic last view with plantiff culdently turned his ver into this traffic line without motion and struck liars a car, foreing it into the contineum lane and caucing it to collide with a car craim from the negtine

Defendant Llary followed plaintiff, wein; mores on beridan, draw his car alongelds that of the plaintiff and or wish into it in an areast to force plaintiff's our to the ours, is labella sinet member to two-thinks of a wile served of loyes — derendant forces plaintiff's our to the ours, seconding to pinintiff's coery, one robusted by sedicions, blar case around to the ours eigh of jillar coer, opened by sedicions, blar case and problem in target his second to the our. There is the last the case, the two is the case, the case of the case, the case is say.

Plaintiff received a one on the nose, teth eyes were black-

several abracions on the jaw and check and a small fracture in one of the bones of the elbow. A photograph of plaintiff is in the record trading to confirm them injuries. Attract realization of limiting the plaintiff is in the record behind, helding six are a matter be use so willing plaintiff. Large hit his once or twice more. A doctor testified that he examined plaintiff to the day of the injuries, found in its analysis flow. With two definite, deep out on the hundred and existing an injuries of the face; that plaintiff are measured and existing, and the acetor diagnosed his case as a contusion of the brain.

It is unnecessary to decide whether plaintiff was involved in a collision with another automobile, as testified to by clarr and denied by plaintiff, or whether he was leaving the scene of an accident. Plaintiff was taken, while in this hysterical condition, to the 'vaneten police station where he was found utilis of leaving the scene of an accident and Fines, but this is not of leaving the tance in this case.

It may be admitted that a private person may arrest without a warrant for a misdemanor committed in his presence, but neither on officer nor a private person, in attenting an arrest, may resort to excessive or unreasonable force. Elars admits it has not accessive to inflict such injuries upon plaintiff and admits he best plaintiff as punishment for leaving the scene of an accident. He testified, "I administered a little punishment to Anderson: "and stalls, that "Anderson will never forcet, he will never leave the scene of an accident again."

The jury, which saw the witnesses and heard them testify, would have little treuble in arriving at the conclusion that the unprovoked assault by defendant upon the elder plaintiff was unlesful and malicious. The verdict of \$500 was not exceedive in view of the serious nature of plaintiff's wounds.

Defendant says the court consisted error in instruction the jury that although they might consider the fact of plaintiff's conviction of a traffic offense in another proceeding, such finding is

ervorel abrasions on the levent custon and finitely in the some of the bonce of the electr. A chekupuph of plaintiff is in the record touding to centim these injuries. Is neverous grained lateriff from botting, helding the area, and while he was so helding this plaintiff, light his ones or fedor more. A doctor hestified that he exected in the fair on the day of the tajuries, found his since the reverteel, with two definite, deep outs on the next and abrasions and the face; that slattiff was confused and excitation, and the cone as a conjusted and exected the cens as a conjusted and she health.

It is unuscessey to decide whether plaintiff was involved in a collision with amether automobile, as testified to by Flags and decided by plaintiff, or whether he was leaving the scene of as accident. Plaintiff was taken, while in this hystorical condition, to the awarden police station where he was found pullty of leaving the musca of an accident and fines, but this is not of decisive involventure of an accident and fines, but this is not of decisive involventure of an accident and fines, but this is not of decisive involventure.

It may be admitted that a private person may arrest without correct for a mindersamer committee in his present, but melther an efficer nor a private person, in attempting an arrest, may pasent to exceeding or unreasonable force. There exists it was not mecessary to infilm such injuries upon plaintiff and acults he best plaintiff as punishment for leaving the come of an accident. In terrifical, as punishment for leaving the come of an accident. In terrifical,

The jury, which was althouses and heard them tentify, would have little trouble in erriving at the sensivoien that the un-

the galety of the constitue constitues in instruction the com-

evidential only and not binding or conclusive as to the facts in the present case. This was a correct statement of the law.

Sower, all of the argument and instructions given or refused touching the aliened consistion of a traffic offence by claimtiff have no cearing upon the sole question in this one. Toosiy, Did defendant use excessite and consequence force in its alients to arrest plaintiffs as as have indicated. The eldonomical force is a was guilty in this respect was so overwhelming as to sake all other issues, by comparison, immaterial.

The jury returned the only verdict that could properly be returned, and the judgment thereen is affirmed.

JUDGMENT APPINNED.

Matchett, P.J., and O'Connor, J., concur.

evidential emly and mot binding or nonclusive as to tee fore in the gracest case. This was a correct character in the lat.

However, all of the arguess and insurerises i.e. of refused nearing the alleged cominsion of a traffic offeres in timtiff have no bearing upon the reis thesetion in this case, nately,

Del defendant has ancestive and narrangelike force in attempting in

the guilty in this requestions so trepublishes to take it other
tennes, by corperions, immitwire.

the jury referred the outy vandict that and a reperty or returned, and the judgment thereon to arright.

JUNEAU PARTICIPATION OF THE PA

Materiate, F.J., and D'Carnor, J., aceder.

40901

ANDREW BEDWARGZYN, Appellee.

MOUNTA RUDIE, "That, De l'andante.

MATILDA YOULIN, MAIDIStratrix, etc., Appallant. STRAGET NUME. UUL LALTUUTTI.

305 I.A. 490'

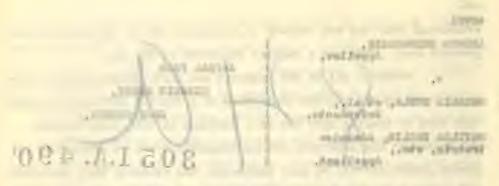
MR. JUSTICE MCBURELY DELIVERED THE OPINION OF THE COURT.

This proceeding involves the foreclosure of the lien of a trust deed dated March 24, 1922, executed by John and Boralia Sudla, which has already securise an unconscionable account of the of the courts.

When plaintiff filed his complaint of foreclesure November 5, 1956, he made Matilda Yoelin, individually and as administrative of the estate of Fishard Coroli, a party defendant; a deares was ontered ordering a sale of the property, from which Matilda Toolin appealed directly to the upress court, claiming a prior Jud cont lies on the property by virtue of a decree in favor of Coraki, and attacking the validity of the trust deed and the foreeless proceeding; the supreme court, being of the spinion that no fresheld was involved, transferred the ease to this court. (370 Ili. 804.)

In an opinion filed by this court Cateber 23, 1939, 301 111 Ann. (abst.) 610, we gave consideration to the various claims of Matilda Toelia, with special reference to her claim that a creditor's bill was filed to subject Eudla's property to the lies of an ever's made to Michael Gorati under the Workmen's compensation out and that plaintiff's rights were subordinate to the Jorski decree. . . held against these claims.

the master in chancers advertised and sold the presises in accordance with the terms of the decree for \$5300, and the report of the sale and distribution was approved; . atilda scelin files suceptions to this report, which were overruled, and again she apposled



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e in the last to same fearly wit accident addressed atal.

and in the interest and determinent to beingone throats and determinents.

Then plaintiff filed his complaint of formale-west invading of the setate of Historia, a party detendent; a decree was national ordered and term of the property, from which 'atilia locking appeared directly to the impress court, claiming a prior jusquent lian on the property by virtue of a decree in favor of double, and attaching the validity of the trust deed and the forceleans propositioning; the impress court, being of the solution that no freehula was involved, transferred the case to this sourt. (270 iii. 214.)

In an opinion filed by this court comber for law, law, and fill App. (abet.) 610, we gave consideration to the various of ine of interesting the file Health, with special reference to beer claim that a creditor's bill was filed to emblor fudin's property to the lies of an amord made to michael Horst under the volumen's forgenation hat and that plaintiff's rights were supprished to the forest decree. In held

the menter in chancer; advertised and sold the promise in the coordance with the terms of the factor for issue, and the report of the coordance with the first which represents the first alies are

to the suprese court, ascerting that a freehold was lavelyed. The suprese court hald otherwise and transferred the saure to this sourt. (371 Ill. 833.)

The only point now before this court is the regularity of the sale and the order approving it. The record shows that the easter sold the property for \$500, which was the highest and best bid for each; the atterney for Matilda Yaelin asserts that this take was not for each, but the record shows to the contrart. In also asserts that she bid, on behalf of Matilda Isalin, \$550, which should have been accepted by the master. The record shows that she did not bid this assunt in each but affered in payment the decree entered upon her creditor's bill based on the award to brake, to which proceeding plaintiff was not a party, and which, as where seen, was held by this court to be inferior to the rights of the trust deed forceless herein.

when the meter's report case before the channellor as told counsel for Matilda Teelin that if the would bring into court a cashier's check for 150 more the court would accept it, but this proposition was not acted upon.

Her present appeal is wholly without sorit. It is just as important that there should be a place to end as that there should be a place to begin litigation. * https://example.com/litigation/. * <a href="https://example

The order of the chancellor approving the seater's report of sale is affirmed.

ORDER AFFIRMED.

Matchett, P.J., and O'Connor, J., concur.

to ten supreme sourt, aresvilar that a freezast use involved. The Suprem sourt held ottorrated and transferred the court hald of the court hald

The only point now before this court is the regularity of the sale and the order spraying it. The second shows here the unster sold the property for \$200, which was the his meet and best that for sath; the actoring for bettill Section asserts in I was sale as and for each, but the record order to the contrary. In also as asserts that the bid, on being or sathlike Section, \$200, which was the bid, on being as the negation in a dearen and not bid this assent is a few areas in a section of the dearen entire you has a section of the court of a large, and which proceeding plaintiff was not a party, and which, as we have each, was held by this court to be infried to the rights of the savel.

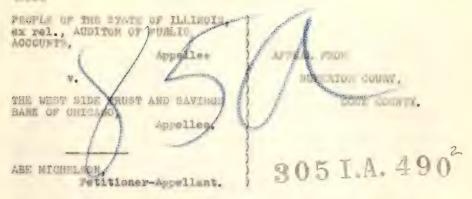
then the master's report come before the chanceller in tell counsel for Vetilée Yealin that if she weald betay have sear a cashier's check for felt move the court would accept it, but this gray columns not acted upon.

as important that there should be a place to end as that there thould be a place thould be a place thould be a place to be a place to be a place of the a pl

The appear of the chanceller spyporing the mater's report

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SERVERY STATE AND DESIGNATION OF SERVERY



MR. JUSTICE HOSURELY DELITERED THE OFINION OF THE COURT.

abe Tichelson filed his petition in the liquidation proceedings of The sest lide Trust and Lavings Sunb of Chicago saking for the allowance of a preferred claim of 45,000 and for paneral relief; the chancellor held that his preference was limited to each on hand and due from banks at the time of the classes of the bank, and also denied other relief sought, and from this decree positioner appeals.

Was the \$45,000 in the possession of the bank to be used by it for a specific purpose or was this an ardinary deposit, on a parity with general depositors?

The evidence before the master showed that politioner, prior to rebruary ly, 1932, had been in the wholesale clothing business in Chicago for about twenty-eight years; he was illiterate and unable to read or write Inglish; his signature, which appears in the record, indicates this; he did his benking business with the next side Trust and Davings Bank, hereafter colled the Bank, where he was a depositor with a general commercial account; he purchased real setale sortgages through I. H. Heymann, president of the bank, and a special account which he had in the bank would be charged with the amount of these purchases; these securities, which are itemized in the petition, were kept in the possession of the bank, which issued to petitioner a "Safe-keeping receipt."

ME. JOHNSON MOURENTY DESCRIPTION OF THIS OF THE GLOST

osedings of the rest Dide Tract and Pavings hash of Chicsgo asking for the allowance of a preferred claim of (45,000 and for general relief; the chancellar held that the areference was limited to each en hand and due from banks at the time of the closing of the bank, and also deried other relief cought, and from this dearer patitioner appeals.

dam the fdf, 100 in the possession of the bank to be used by it for a specific purpose or was this as erdinary deposit, on a

prior to Pebruary 19, 1952, had been in the whelesale elething business in Chicago for about twenty-eight years; he was illiterate and unoble to read or write inglish; his signature, which no, ears in the record, indicates this; he did his banking business with The wast like frust and Savings bent, hereafter selled the Lack, where he was a depositor with a general commercial account; he gurehond he was estate mortgage through i. I. Neymann, president of the bank, and a special account which he had in the bank would be charged with

February 19, 1932, the bank was holding in eafe keeping for petitioner concrities of the Face value of 10, 10; in December. 1931, some of these securities had defaulted and petitioner disoussed the matter with ". a. seir, the hang's cashier: Wayann, the president, and air then had regotistions with petitioner as a result of which on February 19, 1932, the bank purchased all of potitions to securities for 48,000, which was a loss to him of 17,000; the opens for 145,000 was issued by the bank; beir inquired of pettuioner what he was going to do with the money; stitioner replied he as a sick man and wanted to protect his family and was going to may liberty bonds with the 45,000; Heymann said liberty bonds were too him then but that he would purchase then for petitioner; on petitioner inquiring as to that Reysana would do with the comey in the me metime, Heymann replied he had told Wr. weir, the caspier, to put the money in a special account, 'and it is just the same like you got your bonds and mortgages in safe-keeping, and "when the bonds go down" he would buy them for petitioner. The shock was not in prtitioner's possession but he endorsed it and turned it over to sir, receiving a deposit slip from weir; he said he was "kind of diary" and did not examine it. The president again repeated that the check was "like you got your paper in safe keeping and we buy liberty bonds for you. Thereafter plaintiff inquired at the bank once or twice a week as to whether they had purchased the liberty bonds for his.

refer the petitioner to him as he did not want betitioner to draw the money out of the bank; that petitioner was to be thrown "off the track from buying liberty bonds;" that all of the banks were in desperate straits on February 19, 1932, and thereafter, and the bank did not wish to deplete its assets by having petitioner withdraw his 145,000. Feir said he was instructed always to tell petitioner that the market on liberty bonds was still too high, and he, petitioner, "was always cast acide;" that in october, 1932, the soney was still in the bank waiting to be used for the purchase of liberty bonds.

introduction its to the basis of the test of the reading Par politioner securities of the Star wiles of St. 10; is lectuler, 1931, were of Nume scouplines and foliables and politiones also-givent, and seip then had septiated with revitional and a result of which on February In. 1981, the bank purchased at a religious to securities for 165,000, which was a loss to him of 177,0 %; the chack Service of the to be deed all the same and the bound are contained to fivis a ser of leifter tenethiter (years off title of at matte and ad men and wanted to protect his faully and our going to buy ittents bonds with the (45,000; Newson said liberty bonds were too hink resultiton no translitty well and anchorny bloom of fade fud and -save off of gener out dive ob alove analysi fade of as guirlugal time, hayrann replied by had teld Mr. .elp. the eaculer, to rat the comey in a created account, "and it is just the came like you are on simul and name ins " inigent-otes at appropriate has shoot mor down" he would buy them for retilioner. "he check was not in cotitioner's possession but he endermed it and burned it ever to receiving a deposit with with the said to was "him of there's and did not enumine it. The president egals repeated the time ofest was "like you got your happy in and beening and se buy liberty bonds for you, " Thereafter plaints inscired at the book one or tale a week as to shether they had received the liberty banks for him.

Vair tratified before the marker that depends talk his to refer the politioner to him so he did not went politioner to haw the point one the heart the money out of the bank; that politioner was to be thrown "off the track from baying liberty bonde;" that all of the banks were in desports straits on February 19, 1938, and thereafter, and the bank tid not wish to deplote its assets by having politioner withdraw his ide, COC. Seir and he mas that the high, and he, positioner, that the market on liberty bowds was still too high, and he, positioner, always seat anise; the the parchase of liberty bowds was the parchase of liberty bonds.

April 1, 1952, plaintiff was ill at his home, and at the request of Haymann, Non Michelson, potitioner's brother, took a blank check to petitioner and bad his sign it, saving that Seymann was going to bur 150,000 of liberty bonds. This check appears as a charge against the special account on April 1, 1971. The bank did not buy the liberty bonds but redeposited this check to the same account on the next day. Subsequently petitioner has frequent talks with Reymann concerning purchase of the liberty bonds, beyond assuring petitioner that the market price was soing down. Petitioner left for California on January 16, 1853; the Auditor of Public Accounts took charge of the bank on March 4, 1954 and a receiver see appointed. The bank never respond. Petruary 19, 1951, and at all times thereafter the bank had on hand in excess of 145,000 in cash.

All of the above facts are contained in the report of the master in chancery and supplemental report by the same officer serving as a special commissioner after the expiration of his term as master. The reports conclude that the 45,000 left with the bank for the specific purpose of buying liberty bonds became a trust fund for which petitioner was entitled to a preferred claim; that this was established by the three persons who were present at the time of the transactions. Reymann was not produced as a witness and did not testify. The reports find that the bookkeeping arthude used by the bank in handling the funds are of no importance in view of the agreement to devote the fund to a specific purpose; that the device by Keymann of placing the fund in a special account was for the purpose of augmenting the bank's cash reserves; that this did not change the relationship of the parties. The supplemental report recommended a decree allowing to petitioner a 45,000 preferred claim, payable pro rate with other trust claims out of the deposit made by the bank with the Auditor of Public Accounts under the Trust Companies et (chap. 32, par. 287 et sec., Ill. ev. liete. 1939), and if this be insufficient, that the receiver of the bank pay the balance with other preferred claims in priority over general claims.

April I. 1925, glaintiff rea fil of wir hope, and at the router of Seymon, Sen Michelson, residence to bruther, teck a ulant check to petitioner and had his sire it, sering thet inguent was going to hay 100,000 of likerty bonds. This check somers as a charge deciset the eredial second on April 1, 1912. The bask did not buy the liberty boads but redecested this cheek to the seme edies snaugest had thought postification the day of the edit of the country that the transfer of the country that the country with heyears consurates parenter of the liketty boads, beyann absoring potitioner that the sarinet price can guing down. 'estitioner silve to daltiermin on dammer la, 1222; the dates of the Locate took charge of the bank on March 4, 1800 and a recelver and arpelated. The bank never respected. Johnnary 19, 1928, and at all times thereafter the bank had so had in excess of 15,000 in such, and to tropper ent at benintuon ora atom's events and to disk wastin one and the troops and amplemental record of the same officer servine as a sessial accessorator size one painting if his term as waster. The reports conclude that the 45,000 left with the bank for the specific ourses of buying liberty bonds because a finet fund eins suit tainle bearetern a es beldidae aes receives duties wel To said the Income orac orac apparant sand told to buildies on any the francouries as heardery for was no years and recorded with not teatify. The reports that that the bookiesping asthetic used by the bank in handling the funds are of no importance in view of the agrequent to devote the fund to a monific surpose; that the device by Reysann of placing the fund in a special account was for the purpose of sugmenting the basic's cort reserves; that this did not symple the relational to the selection of the second selection of horocters, ever, but a uncertainty or particular second a believenesses Though any to the radius must party diffe and one villence public THEY AND YOURS ATTROOPS AND THE THEY WANT HAVE AND AND THE SAME AND THE ADDRESS OF THE PARTY AND THE the contract of the contract o and the come off the necessary and ever president/bread of all \$4 this

belowe will other provered about in priority over grown) choos.

Thereafter there intervened two trust and preferred claiments whose claims had been allowed by the count; namely. The trust
Company of Thicago, successor in trust under a certain trust excement, and "dward Perkson, successor trustes under another trust
agreement. In the decrees allowing their claims it was provided
that these were to be paid prior to the claims of all other creditors,
except those on a parity, and slee gave those a lien on the deposit
made with the Auditor of Public Accounts.

These claimants filed objections to the master's report, which were everywed; these objections writed that the relationship between petitioner and the bank was that of a creditor and debior.

Subsequently the receiver and these claimants filed further orjections; the chancellor oversuled these objections and exceptions except in certain particulars.

The decree found that there could be no question from the evidence that petitioner's 145,000 was left with the bank for the sole purpose of purchasing liberty bonds by the president for the benefit of petitioner; that an express parol trust was created, and petitioner was allowed a preferred claim, payable "pro rain with other preferred claims in the same manner." The decree then found that such preference was limited to each on hand and cash due from banks at the closing of the bank, and also held that petitioner was not entitled to the benefit of the deposit with the Auditor of Public Accounts as petitioner's trust agreement was an oral agreement and not equivalent to a deed. We are of the opinion the master and chancellor were correct in holding that the evidence showed the creation of a trust fund of 445,000, left with the bank for a specifically designated purpose.

In <u>People</u> v. <u>Farmers State lank</u>, 238 III. 134, 137, it was held that there are two kinds of bank deposite: special and general. As a rule when a general deposit is made the bank becomes the debtor of the depositor to the extent of the deposit, but where somey is deposited to be used for a specifically designated purpose it is a

Throat there is a later when the continue the crisical elemonto where claims had been allowed by the compt: secoly, the Tract
Company of Chicago, encourage in truck under a serial truck cureeevenement. In the decrees allowing their claim it was provided
that these were to be twid prior to the claim of all strew areditors,
except there on a parity, and also twe then a lies on the deposts

between petitioner and the bank was that of a presitor end dector. Subsequently the receiver and these elements filed further the Jootlone; the chancellor everyaled these objections and exemptions

The decree found that viere earld he as cuestion from the evidence that patitioner's left, 000 wer left with the best for the sole purpose of purchasing liberty bords by the precident for the best of patitioner; that as express jural trust was organed, and petitioner was alloyed a preferred claim, payable "organizated and other preferred claims in the case meaner." The borne than found that such preferred claims in the case meaner. " The borne than found that each two from beater at the claims of the bank, and also held that retitioner was mad entitled to the beaters of the deposit with the beditor of case and counter to the squivalent to the specific view opinion the waster and chancelier sere correct in helding that the cyliques chosen the

As a rule when a general deposit is made the bank becomes the debter of the deposit, but where money is

exist. This distinction has been followed in _conls v. _cates, Sel III. 430; Dalar v. D'Gannell, MSS Jil. 200, and other cases cited.
Cases cited by opposing counsel, like recole v. _farmers _tate cank, supra., and _conls v. _tate _cank of maywood, MSA Jil. 319, 626, are not in opposition, as in those cases the record fistissed no agreement whatever that the funds should be used for any particular purpose. It can hardly be claimed that the real setate securities originally purchased for petitioner's account and retained for safe keeping in the possession of the bank, established the relation of debtor and creditor. Searing this in mind, no subsequent should in form of these securities or bookkeeping accounts with reference thereto changed its essential transaction as the creation of a trust.

Any expressions which show clearly the intention to create a trust will have that effect. Dawes v. Dawes, 118 fil. Ann. 20; February v. Gairo-Alexander County Bank, 182 fil. App. 143, 301; littleder v. Heiligenstein, 308 fil. 434, and other cases. Heymann was continuously deceiving petitioner for the purpose of "throwing him off the track" in the purphase of liberty bonds and Heymann's purpose see to keep the 145,000 fund as part of the assets of the beak. There is point in the suggestion by petitioner's counsel that the receiver chould not take the position in support of Heymann's deceitful conduct by arguing against the return of petitioner's money to him.

It is unnecessary to comment upon the large number of cases cited by diligent counsel for all parties. Fetitioner's claim rests upon the undeputed fact that the .45,000 left with the bank was to be held by it, just as it had held petitioner's securities, and to be used for the specific purpose of purchasing liberty bonds.

Reduced to its simplest elements we have the picture of an illiterate, alling customer of a bank, trusting its officers to carry out his specific wishes concerning a certain fund intrusted to their care, and a bank president who, while pretending to the customer

equality distinction has been failered in [res]; v. Feice, 351

[11. 435; Mainy v. O'Concell, 755 [11. 255, and start three ofted.

[11. 435; Mainy v. O'Concell, 755 [11. 255, and start three ofted.

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[11. 435] Mainy v. O'Concell, 755 [11. 255 [11. 255, are not in epposition, as in the reservable be used for any particular purchase that the funds that the reservable securities

[11. 435] March postersion of the Main, setablished the relation of there and oreditor. Fearing this in mind, no subsequent charge in form of these securities of these securities or bookseying accounts with reference there.

[12. 435] These securities or bookseying accounts with reference there.

their cars, and a bank president who, while protending to the exctoner

to do se directed, attempted, by banding schanics, to divert the outtoner's special fund into the general assets of the bank without the gustomer's knowledge and contrary to his directions. Nothing the bank might do could destroy the relationship of trustee and beneficiary without the consent of the beneficiary.

are of the opinion the chancellor erred in not direction payment of etitioner's preferred claim in priority to seneral claims. As petitioner's .45,000 was intentionally used by the bunk president to augment the assets of the bank when it was in financial difficulties, and did not use this fund for the specific purpose for which it was delivered to the bank, plaintiff is entitled to resort to the general mass of assets for the return of his money because that general mass was improperly augmented by the use the president made of petitioner's property. People v. Nates, 361 111, 419; People v. Chicago Bank of Conserce, 275 Ill. App. 68; People v. Ridgely-Farmers State Bank, 281 fll. App. 292; Balar v. O'Gonnell, 284 Ill. App. 331; and recole v. Illinois mank . Trust Do., 200 Ill. App. 521. State, ex rel. Sorensen v. Faruers State Sank, 121 Meb. 532, contains a comprehensive discussion of the rule, and says: "General depositors are not entitled to the fruits of the bank's betrayel of trust. ** The doctrine requiring the beneficiary of a trust to trace his trust funds into some specific asset or property in the cetate of the trustee or in the hands of his receiver as a condition of reclaising them did not originate in any moral philosophy or in any sound principle of equity jurisprudence. The defense of that doctrine lacks cogent reacons and involves a resert to opinions reiterating initial fallacies. ** In equity the depositors do not have a valid claim for the amount of these trust funds. 'quitably they belong to intervener and the district court wisely ordered the receiver to pay them in full." Hany other decisions from other states might be cited to the same effect.

The special commissioner held that plaintiff, being the beneficiary under a valid express trust of personal property, is

to do an directed, attouched, he harding nockeases, to sivery the cuntement's execute that into the governi access of the back visious the musicense's knowledge and contrary to his directions. Poshing the bank might do could destroy the solationally of trustee and confidency vithous the canons of the beneficiary.

are of the clinion the chancellar erred in not directing large of vilgoin; at minic berrolesy a remolation to inemply ined this ye bern glimesidaeshi ase CCO, Bl. etcomition as Internative at new of meder shad now to abserve and toungue of functioning difficulties, and did not use this fund for the exectic surpose for fuses us defined to the book, gialuttit is sutified to be all to the gottonal mass of assats for the return of his zoney beauted sackleans and sen entry to between us y increased new seem farence take sade of prilitements property. Pacale v. Bares, 221 111. 420; legals w. Discuss Sade of descripe, and lit, burn, 500 legals w. Distribution of the board and this day, and clare a personally see ill, app. 1921 and recolm v. Illiants hads a Traff let, see ill. NOT THE PERSON OF PERSONS OF PERSONS AND ADDRESS TO A PARTY AND ADDRESS. tagas inc , also odd in malacasally efficatespars a salatano , 250 mignet and he adjust and of helitine for was wroteened Lorenal's betragal of trans. "" The doctrian requiring the beneficiory of a property on seems officers once onthe tents that the seems of feart a sa tavisco aid to sand out it to set and to the realist layer the at etanizine for his most unimialour to maillines chilosophy or in any sound principle of equity jurisorulance. PROPERT & STEEDINGS Disc ancestory Roughes actual anglescan hady by asserting -el apinione religrating initial fallacies. - In equity the detrues send to summe ods not minic blink a wed for an everising Pure Jacubally off has ansecuted in pasted care absenced wisely ordered the receiver to pay then in full. " Hear order dr-. Hear from scher states wight be elted to the seas effect,

The special countries and that the plaintiff, being the

entitled to the protection of the deposit and by the trusts— ith the Auditor of Public Accounts under the Trust Companies Act. The chancellor exetained executions to this finding and well that petitioner was not entitled to this protection, recting his decision upon the fact that the express trust a rain was established by parol evidence and not by an instrument in triting. If the express trust is established by a rel it is difficult to see why it should not have equal potency with an express trust established by a writing. The only difference relates to the evidence of the fact of the trust. It would seek surficient to establish this by parel unless there is something in the statute which disqualifies such an express trust so established.

The Trust Companies Act (chap. 52, par. 887 et sec., Ill. hov. tate. 1939), was first passed in 1807; at the same section a new banking law was passed. (11, Chap. 16-1/2, 1th-ur tata. 199.) This provided that banking corporations were authorized to "accept and execute trusts. * The act placed no limitation upon the kinds of trusts which banks could accept and execute, but the use of the word "accept" indicates a voluntary assumption of an obligation and not those resultant and constructive trusts arising by operation of law. At that time the statutes seemed to bar corporations from acting as trustees, or as executors, conservators, grantees in deads and trustees in real estate under wills. See 141 Corpus Juris 206, for a statement of the law at that time, the author saying that where there is no statutory repeal the old rule is still followed. and statutes providing for the appointment of persons to such positions of trust are construed to apply to real and not to artificial persons. It therefore became necessary, in order that corporations might be appointed as executors, trustees of real estate, etc., that a statute be passed permitting this and giving such corporations equal authority as in the case of the appointment of a natural person. Cut of this situation grew the Trust Companies Act of 1837. As its title indicates, it is an act (1) to provide

entitled to the protection of the deposts made by the truetes with the mulitor of inteller according according according according according according to the fluid fluid, and self they according to the protection, resting his decision upon the fluid that the tayenes trust levels, as established by paral evidence and not by an instandent in writing. If are press trust is difficult to the constitution of the constitution of the extension of the trust is according to the first according to the first trust. It would not there is constituted to the state of the first of the first according to the trust of the trust. It would not the according to according to according to the trust of the trust. It would not the state of the state that this by a column of the trust is constituted and the action disqualities and an

the frust Joursales Lot (abst. 72, par. 207 ot cms., Ill. Avy. . tate. 1889), was first pussed in 1887; at the same estation a owe besting law see passed, [11, Then, 18-3/2; het Martine de 1815] The provided that bearing oursellain year sollieries in bearing and he shall his copy sufficient on front year all " . winest absone has Courte of the land and and advance has deposed the are at the Ora obligation as to religance a voluntary account to color to other transfer and to still original to highly afficial vellenments of the footform souly but At that time the statutes seemed to har corporations from LINE sting as trustees, or as executors, concervators, grantees in dueds and trustees in real estate under ville. Fee le Gornes Juris 198, for a etalement of the law at that the time suiter exting that where there is no electricity report the old wile is still Telecon. sad statutes providing for the appointed to serious to second of for large of this of bourdened one fauts to ancitio artificial persons. It timpeloue because mecessary, in order that Janu to section; profittees as febilious of biggs south inspecestate, etc., that a statute be passed permitting this and giving Insulating a will be only sell all an ericulture falls and engineering on them of a satural person. Out of this situation year the Truet Companion and of the tra an el-fi contrology of the ave at the control of

for the administration of trusts by trust companies, and (2) to regulate the administration of trusts by trust companies. The banking act passed at the same time had for its purpose the removal of the restrictions on the appointment of corporations as trustees. By section 1 of the Trust companies but it is provided that any corporation innorporated unies the general corporation laws may be appointed assignes or trustee by dead, and executor, or trustee by will, and such appointment shall be of like force as in pass of appointment of a natural porcha.

It should be a fed but this is the only place in the frust Companies act which uses the words "trustee by deed, and executor, or trustee by will." It is based upon the presence of these words in the act that the conclusion is from that only such express trusts as are created by an instrument in writing can invoke the protection of the Trust Companies Act. We are of the opinion this is a misinterpretation.

Section 6 of the act provides for a devosit with the Auditor of Public Accounts for the benefit of creditors. This has been amended several times, and in 1925 it was amended so as to limit the corporation from accepting and executing 'any trust concerains property" without complying with the provisions of this act, This language would seem to indicate a legislative intention not to limit the regulatory sections of the act to the express trusts referred to as created by deed or by will. A reasonable construction of the Trust Companies Lot is that it applies its regulative provisions to all trusts which corporations are authorised to accept and execute. Such a construction would seen to be based upon common sense and fair dealing. In In re Mational Lank of Ottawa, 73 111. App. 845, it was held that a trust company's deposit with the Auditor of Public Accounts was for the protection of a beneficiary under a writing not under seal. In Jones v. Lloyd, 117 Ill. 507, a trust in real estate was unheld although the only svidence of the creation of the trust was a pleading in a prior suit. such pleading

for the addatable to all truets by truet companies, and (f) to regulate the administration of truets by truet companies. The banking act one administration of the had for the respectiveless to removal of the restrictions as truetces, by section 1 af the Truet Companies act it is provided that any expenses by deed, and excluse or truetce by deed, and executor, or truetce by deed, and executor, or truetce by deed, and executor, or truetce to any entering that force as in order of appointment on all the force as in order of appointment of a natural.

Tower Companies Act which uses the certs "tructed by Ared, and executor, or tructes by will." It is based ones the remember of these words is the set that the centiusion is truck whit only main appress the tructs as are created by an instruces in writing that invoke the protection of the Truct Companies as. "a pro of the opinion this is a misinterpretation.

lastics & or the are previous for a deposit will be suffice of Paul Accounts for the benefit of craditions. been snended several times, and in 1999 it was erauded no on to -nos farri qua" unilerent bas unit quesa mort noitaregros sii tinii . The will to ampiate out dishe the light of the type grant and man tor animetri evilulatent a similar of and bloom equipart siat asser over and as son as to accident proteins and sixis of particular administration in the set of the administration of Description of the Tract: Impublic het is that it englist in replaced or ne-Agrees of Sections/in my analysempson suffic advant Its of analyty and execute, that a sometime by the war in he had properties All the mates to inst Domittee or all all goalest with the sense Mar. 15 and late should should seepenge to the first and all the conauditor of Palala Accounts was for the restricted of a baueficing nelso a weight has named head, In June 1 live, III III, not, a and the encountry time out opposition Manipa and minipas Lara all Paints

vas obviously not a dard. In mith v. Lounty of Lagan, it Ill. 165, it was held that in construing a statute the intention is the son-trolling factor, and in Moyne v. Lanisch, 264 Ill. 467, it is said that in construing a statute such construction should be avoided which results in great inconvenience or absurd consequences unless the meaning of the legislature be so plain and manifest that avoidance is impossible. As pointed out in the brief for retitioner, if only express trusts created by deed or by will some under the protection of the trust ucedancies act, there would be withheld from its benefits written trusts involving real estate over on scal is affixed to the writing, trusts of personal property syldenced by writings not under seal, and trusts like that in the instant case, created by conversations, facts and circumstances.

Cases cited in opposition do not squarely meet the present point, although expressions say be found in some of the opinions indicating that the creation of the trust must be by some instrument in writing. In People v. Cody Prist Co., 194 Til. hpp. 140, the point was whether there was an express trust or a trust or a ted by operation of law, including resulting and constructive trusts. court decided that the trust there under consideration was the latter kind and not, therefore, under the Trust Companies at. A similar question was involved in Feople v. Chicago sank of Corneres, 196 Ill. App. 487, where it was held that the evidence, although in writing, was not sufficient to create a trust. That case went to the Supress court (371 Ill. 396), where it was noted that the appointment of the bank as trustee was actually under seal and therefore, technically, a deed, but after an analysis of the writing the court affirmed the judgment of the Appellate court that it was not sufficient to create an express trust.

of an express trust, created in a legally valid manner and accepted by the bank, is a trust creditor satisfied to recourse against the deposit with the Auditor of Public Accounts.

and obviously not a deal. In this we can be intended in the intended it to a control of the time of the test of the control of

Cases cited in opposition do not squarely uses the proerat point, although expressions may be found in some of the clinions Supported and the entropy and to be the total and the patholini AN AREA AND AREA AND A SECRETARIAL OF ADDRESS AT ga betalico terra a co truca cancina ca a ma espet coltain con falec operation of law, including resulting and constructive trusts. undied, and her collections when south reest and past Easiped Phone milded . Jo ociocont the fault desper . Jo ociocont question was involved in feerle v. Littere tank of Semerce, Tie III. App. 407, where it was held that the evidence, although in or them sees Jane . Jenet a ereste of fueloffue fon sew , maility the Supreme court (SVI III. 200), where it was noted that the upcrack has less raise plicates now embedd to Ried all to Sandalay ture, to the arter on soulpais of the writing the The tar fo cost from realized old to lawering oil here! The Price . Tolent to execte an express tract.

e see of the opinion the potitioner, being the bearficlary

the bunk, is a truet preditor earliled to recourse exclust the

For the foregoing reasons we hold that the chancellor should not have sustained the exceptions to the master's and special commissioner's report, and that in so coing reversible error was committed. The decree is therefore reversed and the cause remanded with directions to enter a decree in accordance with the recommendations of the master and his supplemental report.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P.J., concurs.

O'Gonnor, J., dissenting:

In my opinion the Trust Company of is no way explicable to the facts in the instant case. That defendant cash did was not done by virtue of that act.

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CONTRACTOR AND THE CHARGE STATE OF THE CONTRACTOR

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o'duner, J., dismenting:

In my opinion the frust Company ast in in as any applient to the fact and not the last as not find defendant bank did was not virtue of that ast.

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CLINET JONDAN, a winar, by topost Jondan, his father and next Friend,

Applial Phon

MUNICIPAL COURT

of chicago.

AATLAAY KORE AM OY, poratea, a Gerporatian,

Appellant.

305 I.A. 491

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

That he sustained injuries by reason of the scaling that he sustained injuries by reason of the scaling of defendant's trailer truck which caused a collision between it and the Ford automobile which plaintiff was driving; upon trial by the court plaintiff was avaried damages of 185 from which defendant appeals.

January 21, 1930; the Ford car driven by plaintiff was proceeding north on Canal street; the truck was going south on Jacal; at a point about 100 feet north of the intersection of mosevelt road (which rune east and west) with Canal street, the truck turned east into a driveway which rune into the Chicago, murlington a miney Railread terminal; as the truck turned into this driveway it was atruck by plaintiff's Ford car; the point of impact was between 7 and 5 feet west of the east curb of Canal street, with the truck headed into the driveway and about 10 feet beyond the east earb.

Plaintiff has not appeared in this court in support of this judgment.

Plaintiff testified he was traveling about 15 to 90 miles an hour and noticed defendant's truck when it was about 50 feet from the driveway; that the truck was traveling between 25 and 50 miles an hour and plaintiff was 25 feet south of the driveway when he first saw the truck. Defendant argues that if plaintiff was driving a listance of 25 feet at 18 miles an hour and defendant's truck was going 25 to 36 miles an hour from a point 20 feet north of the driveway, it would have been impossible for defendant's truck to arrive



ARREST THE THE PROPERTY AND STREET, SANSAGE SANSAGE AND

Paintiff, a winor, brought sail be his father, altimine lefted as the first state of the last plaintiff was driving upon tried by the last plaintiff was automobile which describe of 185 from which defendent execut.

The accident imagement elect on vior marring or Jennary 51, 1936; the ford can driven by plaintist was accounting north on danal offerst; the fruck was going south on danal; at a point about 100 feet north of the intersection of coessis on a count to desire the coest (which rune cast and west) with fenal errors, the inact turned cast into a drivener axion rune into the Chicago, implication a minor fullrood terminal; as the truck burned tota this drivener it was caucal by plaintist's ford cast; the point of impact was believed to and 8 feet nest of the east outh of the drivener and aloud 10 feet beyond the east carb.

Lunded into the drivener and aloud 10 feet beyond the east carb.

Flaintist testified he was traveling chart in to ed from an hour and noticed defendant's temak to eas about 6.3 from the driveway; that the travel was traveling between 50 and 20 miles as hour and plaintist was 28 feet south of the driveray than first and the travely that the first and the driveray than the first and the travely that the first can the travely and driving a distance of 25 feet at 12 miles as hour and felendant's truck our distance of 25 feet at 12 miles as hour from a point of feet north of the drive-

at the point of collision prior to the time plaintiff expised there.

Plaintiff says he did not see the truck until it was 45 feet in

front of his. The courts have said the ise will not tolerate the
absurdity of paraliting one to testify that he looked and did not
set, when, if he had properly exercised his sight, he would have
seen. Trubb v. Illinois Terminal Co., 365 Til. 550, 537.

It was a 3-1/8 ton truck, loaded and headed for the Thicago, Surlington a unincy terminal; that the entrance to this is on the east side of Canal street, 180 feet morth of hoosevalt road, and is about 40 feet wide; that he first observed the ford triven by laintiff when it was 180 feet south of hoosevalt; at about one-fourth of a block before making the turn into the driveway he jut on the directional arrow signal, indicating he was turning to the last; that when he started to turn, the Ford was about 100 feet south of hoosevelt road; the truck at this time was going about 5 miles an hour; the front part of the tractor was over the east sidewalk when the Ford struck it at a place about 16 to 18 feet from the front and. The witness said he turned on the signal lights are on the front fenders.

Fred Palm testified that he was employed in the police Separtment of the Baltimore a Chie Baltimore; that upon the eccesion in question he was walking south on the east side of Conal Street; that he first eav the Ford when it was about 150 feet south of Toesevelt; that it was soing between 50 and 55 miles an hour.

We are of the opinion that the finding of the court that defendant's driver of the truck was suilty of negligence and that plaintiff was free from contributory negligence was against the manifest weight of the evidence.

A fact of considerable importance in testing the reliability of plaintiff is that he testified he was a student at Crane High Tehool; that the socident happened on aturday sornin; that at the point of collision prior to the ristative arrived theme. Plaintiff ears he did not see the truck until it see 45 feet in front of him. The courte have note the will not telepase the absentity of permitting one to testify that he looked and did not easy when, if he had properly exercised his side, he would have

it was a 2-1/2 con truck, loaded and headed for the Tricage,
it was a 2-1/2 con truck, loaded and headed for the Tricage,

Mariington a Triag terminal; that the entempes to that is on the
east side of Tanal street, 180 feet worth of norsevelt read, and is
about 40 feet wide; that he first observed the Tord Arives by plaintiff when it was 180 feet south of Nocesvelt; at shout con-fourth of
a block before making the term into the driveway he sut on the
directional arrow eignal, indicating he was burning to the left;
that rhan he started to turn, the Tord was burning to the left;
Nocesvelt road; the truck at this time was roing shout 5 miles an
wear; the front part of the truck at this time east eilemaik wirn
to feet struck it at a place about 18 to 11 feet from the front
end. The vitness said he turned on the signal lights are on the front
before making the turn; that these signal lights are on the front
before making the turn; that these signal lights are on the front

Fred Fels testified that he was ouployed in the palies department of the Deltinors a This Deltrond; that upon the econolog is question he was walking south on the east side of Canal etrest; that he first see the Tard vien it was about 186 feet south of Bossevelt; that it was going between 50 and 55 miles an hour.

he are of the epinion that the finding of the court that defendant's driver of the truck was guilty of negligence and that plaintiff was from contributory negligence was against the wantivet walcht of the evidence.

A fact of considerable importance in testing the relia-

he was minetern years and one out or school for the weeks thereafter on account of the injuries received by ain. In the action for a meet trial the principal and a teacher in the Grane Dish Johnol testified that he was not absent from school for two weeks after the assistant; that the school records show he was absent on January 14, but was arment all other days of that week. The court indicated that he would reduce the judgment to \$60, but when defendant indicated that an armeal weak he taken the sourt said he would let the judgment stand at \$85.

For the reasons indicated we hold that this judgment should not stand. It is therefore reverses and the sauce remoded.

REVERSED AND REMANDED.

Matchett, P.J., and O'Connor, J., concur.

he was misstern yours old and out about for the weeks thereone on account of the injuries received by his. In the motion for a new trial the principal and a become in the first one grant that the rest and account from second for the the rest of any tild accident; that the solved records cive he has absent to finitely is, accident; that the solved records cive he has absent to finitely is, that he would reduce the judgment to the the the solution is an appeal would be taken the rest of the solutions.

Dar Mr. was seen to have been added to the sense processes,

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The P.S., and D'Conner, S., concur.

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MILETA CLICA, 1111 1 ... 111, AGBING TILLIAN CS and IN. 1981.

Appelless,

V.

HERBERT M. SHEDY, 1 MINISTERLY and as executor, Hydrik HITTI, STABLEY SHEDY and RUTH HITTI, and Appellants.

CI CUIT O ET.

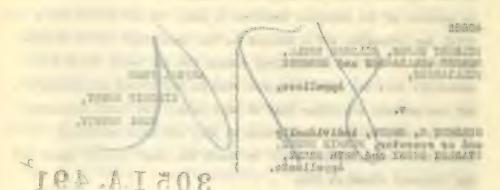
305 I.A. 491

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Flaintiffs, the grandchildren of leorgians lasty, accessed, filed their complaint against Herbert F. meby, a sou of the deceased, and his children to set aside the will of leorgians meby and the probate thereof. They charged want of mental appetity of the testatrix and undue influence on the part of Merbert F. meby. Defendants denied the charges. There was a jury trial and a verdict returned that the instrument was not the last will and testacent of Seorgians lasty. A decree was entered setting aside the will and the probate thereof, and defendants appeal.

and for a short time before cetaber 6, 1937, had been confined to her bed. On that day she executed the will in question and led two days afterward. The lived in the first apartment of a top-story frame building at 2004 M. Pulashi road (formerly Crawford evenue), which she had sweed for some time but which she conveyed to her son, Herbert Teeby (who lived upstairs), by a quitclaim deed, November 28, 1935. The deed was not recorded until July 27, 1937. At the time of the execution of the deed Hrs. Smeby, by a quitclaim deed, conveyed property located at 785 M. Racine avenue to her daughter, Bulds May williamson and Berbert W. Williamson, her Busband, in joint tenancy. This deed was recorded Pecember 8, 1935.

The will provided for the payment of Irs. Creby's debts and



MI. PROVINCE GROWING AND TRUNCH THE ENGRESSE OF SUR DE DE

Haintiffs, the granded describes described fast, Juncared, filed their complaint against describer. The villed their condition to set aridy the vill of Googless heaty of and his oxilitren to set aridy the vill of Googless heaty of and the grobate discreaf. They charged wast of sental especity of the tested and undue laftwees on the part of serial and a vertical returned that the instrument was not the last will and restaurant of decree was entered esting acide the will and tested and estendants against the grobate these was entered esting acide the will and the grobate these thereof, and decree was entered esting acide the will and

The record direlesses that terreless the terreless teacher 2 and for a short time before retoher 2, 1877, had been confined to her hed. On that day she executed the mill in martins and fied two days affermers. The lived in the first sourtsent of a ten-story days affermers. The lived in the first sourtsent of a ten-story which she had owned for some time but which she conveyed to her non, merbert meby (who lived upstairs), by a quitelain doed, hoveners in herbert man accorded matil July TV, 183V. At the time of the execution of the deed had not large, by a quitelain deed, conveyed years or the deed at the large wanne to her daughber, to be the managers. In this second, her marked, in

The will provided for the sequent of real tweet's debta and

bequeathed to verbert. Meby, her son (one of defendants), her bousehold goods, furniture, diothing, javelry and versonal effects: to Wilbur (Wilbert) Jison, her grandeon (one of plaintiffs), 200, and to the three children of her deceased daughter, a note for 13,000 secured by a trust deed on take surjob property. One-half of the residue of the estate was devised to her son herbert, and the other half to be divided in equal parts - one-half to derbert's children and half to the children of her deceased daughter, holds by Williamson. Herbert was named executor.

The evidence shows that the 13,000 note secured by the trust deed on take suries property, which had been executed by her daughter, wrs. Williamson, and her husband, had been surrendered and a release deed executed at the time of the conveyance by wrs. Subsy of her two pieces of property by quitclaim deeds, and that this was done because the property conveyed to Herbert was more valuable than that conveyed to Hrs. Williamson.

The evidence further shows that from about the year land until october 6, 1937, Fre. meby had executes four ville. July 15, 1937, her attorney Thomas lathiesen, who had been acqualited with Mys. Tasby for a number of years, drew a vill for her with which die was not matisfied and afterward she desired to have this will changed which the attorney accordingly did, but, as testified to by him, be made an error by leaving out a paragraph; that about a see! before Cetober 6, he prevared another will and mailed it to "re. weby at her home: that after this will was mailed he received a telephone call informing his that we. Inchy was ill; that he went to mer home Cotober 5, and found her in bed. At that time Laura choff was in Fre. Emeby's bedroom, arran events having been unde to have her there to witness the will; that ere. Imply signed the will in the kitchen being unable to do so lying in bed and it was withersed by the attorney and laure totoff. Terbert, the con, was in the house at the time and there was some evidence he was in the kitchen when the will was executed.

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to dibte (dibort) dison, her greatesn des established, for,

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required by a trust died on take fortest property. The his other

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The evidence shows that the I,000 unto seasoned by the trust deed on Lake Lurien property, which has been executed by tur daughter, tre, villiances, and her huchead, had been surjectives and a Levi executed at the time of the conveyance by re, moby a levi two pieces of truperty by mitchin deens, and that this man the property conveyed to darbort was more valuable than that conveyed to ird, silliances.

BIGI rack sur tures most test that the fire year 1926 until october 6, 1737, tre. teeby had executed four wills. 1937, her attermy flicase Mathiasen, who had been accomisted with Mrs. Smely for a mucher of years, drew a will for her with which me Asymmo ilis will avad of boulsab oil brownstie has beiteline for one which the atterney accordingly did, but, as testified to by aim, be unde on error by leaving out a percept this chest a seek before Solober G. he promised amoriner will and mailed it to 'es. . mely at and been that after the will wer halfs or reverse fact the oned such that that fire, "cody see tilly that he went to how home Tree Purchas a backgroup, and a purchas have been made in the last to wilders the will that been decky signed the the the kitches -in odd yd bessenilu pas ii has hed ai privi on ob or oldanu paied torney and Laure Tokett, Serbert, the see, was in the house at the Ille ent toure and some exidence he am il the bive ones can the

Dr. George Rohader, who first met Are. Emeby Reptember, 1988, at his office, testified that he also treated her at his office February, 1986 and April 22, 1987, but did not see her from that date until tetober 8, shortly before she died. Not alliver, a registered nurse, testified she arrived on the case lotober 7, 1987, and stayed until the next day when Mrs. bueby died. Jack Soc, a grocer, testified he saw her last on lotober 1, 1987. These five persons testified that in their opinion, when they are re. Seely she was of sound mind and memory.

Boven witnesses on behalf of plaintiffs gave testimony to the effect that in their clinion re. Theby at the different times they saw her was not of sound aind and masory. They were Dr. Diverted, a dentist: his wife: Oscar tolb. and insurance broker: Lr. Christenson: Herbert C. allianson, Fra. meby's son-la-law (but whose wife had died prior to the execution of the will); where !. Faddock and Lester Smell, silliamson's tuo mone-in-law, Dr. Brown (who was called by Herbert Heby to attend his wother) saw her on the day the will was executed but he was not called as a witness. There is considerable other evidence in the record bearing on the subject as to the mental condition of wrs. I meby and as to whether undue influence had been exerted upon her by her son Herbert to bring about the execution of the will but we think it unnecessary to lotall it here. The ther Fre. Suchy had mental canacity to make the will and the question of undue influence were for the jury. alrearer v. Sulpherger, 372 111. 240. Upon a consideration of all the evidence in the record we are of opinion we would not be warranted in disturbing the verdict of the jury, confirmed as it was by the chancellor. on the ground it was against the manifest weight of the evidence.

Defendants contend they were desired a fair trial in the admission and exclusion of evidence. It is argued that herbert it. Williamson was permitted to give testimony which was incompetent and highly prejudicial. He testified he was married to are. Imply's

In. George I chader, who first ont ere, 'mety estender, all of-distance, to the also tred on the of-distance, to the also tred on the of-distance, the first has distanced on the colored on the first and sered nurse, testified the arrived on the one cotaber V, istV, and stayed until the next day shen fro, 'weby dist. State one, agreer, stayed a testified the test on setting the constant of the last one sevent of the test on setting they. These fire create testified that in their spinton, when they say ere, noty she was of sound mind and nearly.

haven witnesses on behalf of plaintiffs pass sections in the effect that is tools colaics 're. 'self at the different times Property and organ good, they can her was not of nount ains and henery. a dentist his wife; Comer hold, and incurred broker; br. interesons Herbord C. Williamon, Mrs. Facty's see-in-law fort of Jender ((like the foresteen all the party half the wife will); Raddock and Looger Unell, Villiance's two some-in-law, Ur, Brown and we were collect by Herbert Breity to attend bis action) say her on the ay the will was excepted but he was called as a witness. There to according to the record in the record bearing on the subject as to the markel condition of tre. "make and as to the ther under trois gains at sendreh and test by test and best and best an ultrai the fier of the will but he initial to mercent to mottune and bas like sir oden of vilonges lotane bed vise will and . इ. व्यक्तान्य व्यक्ति है वर्गे he question of undue influence sere for the jury. LI STE TIL SOO. Nicon a sonoideration of all the svidence in the record we are of spinion we would not be verronted in disgolfaquade she the tag as de as de as de sale to the sheet all on the ground it was against the manifest weight of the evidence.

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I have prejudicial. In the testimeny which can incomprise and

daughter, who passed easy sugget 15, 1837; that he had known tre. Smeby for about 30 years. He then testified concerning the two pieces of property conveyed by the cuitchain deeds executed by Wrs. Jueby. It was objected that this was immaterial. The court held the evidence might go to the question of undue lafluence. The witness then testified about the 13,000 note and other matters. That after the bank with which wrs. meby did business closed, which was in 1932 or 1935. Frs. Smeby seemed depressed and forgetful and often had severe pains; that they had Dr. Johnson examine Ler; that he observed her in August, 1937, the time was. Allie seen passed away, and she seemed to decline physically and mentally after that; that up to the time his wife died he saw Mrs. Reby frequently but after that he did not see her often; that it was difficult for him to see her; that she would call for him but he was not teld of tols fact. The court: "shat was the source of your information? If you did not get the messages, you didn't know anything about it. he had friends. didn't she? A. Laura choff told us. " It is objected this was hearmay and the objection was overruled. The witness further testified that filtert Olson, Hrs. Daeby's grandson and one of the laintiffs, who lived with wra. Amely, told him he had to so outside to telephone; that there was a telephone upstairs in derbert's apartment but Herbert's family did not want him to use the telephone. In view of the record we are of opinion any error in this request would not warrant us in holding that the verdict of the jury should be distrubed. Miss Eckoff having testified on the hearing.

We are also of opinion there was no error in persitting Ers. Ulvested to testify that in her opinion Ers. Sueby was unable to carry on her business transactions. Nor was there any error in persitting the witnesses to give testimony to the effect that Ers. Sueby was very fond of her grandson, silbert Olson, as it might tend to show that there was undue influence which caused Ers. Sueby to give but \$300 to him. We are also of opinion there was no error in re-

daughter, who pussed every liqued th, let'll that he had known fro. Smally for about 70 years, is keen keilissi some reim the twe piecan of property conveyed by the cultelein deeds executed by dee. and blad trace and Emely, it was objected teat this was limeterial. evidence might go to the question of undus influence. The wiveses then berilfied about the tl, for some and either sufficient fine of the the beat white which they hashy did beckeen sloces, which wer the 1923 or 1923, ups. Amely atomed degreesed and respected and elten had devers paint; that they had ir. Johnson eaching not; that he alscerved her in turnet, 1937, the ties for. Hills orn record seer, dad trads were glisses has vilatively evilad of hemore and fina up to the time his wife died he saw fire. The past is but after and the did not open to the title of the title for its to the her; that mis vould dall for his he has not set to be tailed. the court: "Hat was the source of your information? If you did not got the necession, you didn't know anything about it. One had friends, didn't chie i. Laure laboff told was it is objected this was heresaftified for shipselfor our septembers. The extract further testificate was bilibers bloom, are, harby's grandeen and one of the ministra, who lived with Mys. Smely bis he had to go outside to velophome; the transfering a tradecount no action of an action as were could desire Marbert's family did not most him to use the telephone. In view of "use for bluer tooger shift at room and adapt to one or broom all rant us in bolding that the verdier of the jury should be divisiond. When Ichert having testified on the hearing.

THE RE LEGICO OF REAL PRINCE PRINCIPLE OF MALE WAS AT LAKE OF COMM. FIRST

fusing to permit drs. serwin many, wife of verwin menty, one of the grandsons, and a defendant, to testify - she was incompetent. In relatate of Techan, 287 Ill. App. 58.

the cross-examination of albert Class. The complaint is that he testified on cross-examination he had lived with his grandacther for over 11 years. He was then asked if he ever paid her any board. It was objected this was not cross-examination and the objection was sustained. There was no error in the ruling. Nor was clean an incompetent witness, as defendants contend, because he was only interrogated on direct examination as to matters occurring after the grand-mother's death. First par., sec. 2, chap. 61, 711. Nov. tata. 1880.

plaintiffe' counsel to impeach one of defendants' witnesses 'in a manner not authorized by law;" that the sourt permitted Mildred J. Smell, one of plaintiffs, to relate a conversation with defendants' witnesse, Laura Schoff, after the funeral of are. Inchy. The witness testified that Laura Schoff told the witness that Herbert Inchy, the uncle of witness, did not want parties interested to see the will for some reason; that he had discussed the will with his mother before it was executed; that she did not want to eigh the will but afterward did so. The objection was that this was hearsay evidence and after the will was executed. In connection with this counsel for defendants say, "while Laura Tokoff was being cross-examined she was asked if such a conversation" had taken place. Miss Schoff answered in the negative. We think there was no error in the ruling. The hearsay rule was in no way involved. Belt My. Co. v. Confrey, 200 Ill. 344.

Defendants further contend that the court erred in giving, at the request of plaintiffs, instructions numbers 1, 2, 3, 6, 7, 9 and 11, and in refusing to give defendants' tendered instruction 12. Instructions 1 and 2 advised the jury on the question of the mental capacity the law requires of one who makes a will, and No. 2 also included the classent of "undue influence." There was no substantial

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error in these instructions. <u>southell</u> s. <u>southell</u>, les all, old; Deals v. <u>salion</u>, of all, list <u>all-barror</u> v. salinater, ev. all. day.

demand for defendants contend that the court gave a number of instructions on the question of "undue influence" although there was no evidence that would sustain such a charge. We think this contention cannot be sustained. There was evidence to the effect that shortly before are. Sueby died, her ear, Merbert, aid not went plaintiffs to see her; that he called br. Srown to see his sother shortly before the died but did not call him as a witness, nor account for his absence; that the distribution of the property of from \$15,000 to \$18,000) made by the will was some evidence properly to be considered on this question.

Instruction 6 complained of told the jury that "where a person reserves the larger part of the property of a testatrix by her will," or where the will is made for the objet benefit of such person and such person to one in whom the maker represe confidence and trust "and there such beneficiary sauces the will to be prepared and is present at the time of the assoution, such facts are circumstances tending to show the exercise of undus inclusions, " and that if the jury believed from the evidence and under the instruction of the court that ere. meby reposed confidence in Merbert at the time of the saecution of the will and that Merbert caused the purported will to he prepared and was present at the time the will was appoint, the jury should consider such fasts in determining the question of undue influence. One of the objections urged to this instruction is that there was no evidence that Herbert caused the will to be prepared; that it was prepared by the attorney, Thomas Mathiesen. Dr. Christenson testified that on October J, he saw Ira. hely and that she was on her deathbed: that Werbert asked him if his maying english Take sere of personal business and notters relating to finances. The

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of instructions on the genetics of "union inflammes" climan a constant of an exist that we are not exist to explain the content to a content to the content to a content to a content to a content to a content that the content to a content that the content to a content that the content to a content that are the content to a content that are the content to a content that are the content to a content that the content to a content to be constinued and the content to be constinued on this case that an expense the content to be constinued on this case that an expense the constinued on the constinued on this case that an expense the constinued on the constinued of the constinued on the constinued of t

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doctor revised in the negative. Amereafter, or Chiroteness was not called but a new doctor was called in. Three days afterward the will was executed.

uncie, Northert, told his not to my saything to the lilianeous as to what took place. It was not error to give the instruction on the ground there has no evidence upon which to best any undue influence.

By instruction ? the jury were told that "inequality in the distribution of property" among those who would import it if no will had been made is not of itself evidence of undus influence or unsoundness of mind but was a circumstance that might be somethered as tending to establish undue influence or unsoundness of mind. As think the instruction was not substantially the same as the instruction was not substantially the same as the instruction was taken verbatin from an instruction approved in Ingland v. v. Fawbush, Ede Ill. 384. There was no error in living the instruction.

Plaintiffs' instruction 3 told the jury what was energy in the complaint. There was no error in giving such an instruction since there was evidence tending to prove the allegations. <u>Sent. By.</u> Co. v. <u>Sannister</u>, 186 Ill. 48.

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Complaint is also made to instruction 11, by which the Jury were told who would inherit are. Smeby's property in case there was no will. It is said this instruction ignored the will of drs. Smeby made July 16, 1937. There is no wer't in this contention. The claimed will of July 16, was in no way before the jury for consideration. Forever, the court at defendants' request told the jury that one could disinherit some of his heirs if he desired to do so.

It is also claimed the court erred in refusing to give an instruction tendered by defendants by which it was sought to have the jury told that "it is incumbent upon the Plaintiffs in this case to establish undue influence by a preponderance of the evidence."
We think there was no error in refusing.

The jury were told in substance by a number of instructions that before they could find the testatrix was mentally incapable of making the will or that undue influence was used, they must believe these to be proven by a prependerance of the evidence. And in an instruction given at defendants' request, the jury were instructed that "The law presumes every person of legal age has sufficient mind and memory to make a valid will and casts upon those who contest a will the burden of establishing by the greater weight of the evidence that the person seeking to make the will was not, at the time, of sufficiently sound mind to make a valid will." Even if we assume that the word "establish" as used in the offered instruction was unobjectionable, we think the jury were sufficiently instructed on the two questions and the refusal to give the instruction was not reversibly erroneous.

Upon a consideration of the record we are of opinion that no error complained of was of such a character as would warrant us in disturbing the verdict or the decree.

The decree of the Circuit court of Cook county is af-

DECREE AFFIRMED.

Vow leint is also made to instruction ii, by dien the jury word told the real first. Saby's preparty in own there was no will. It is said this instruction ignored the said of the made July 15, 1227. There is no morit in this contration. The claimed will of July 16, sas in no way before the just to consideration. Moreover, the court at defendance bequest told the just the court at defendance bequest told the just the court at defendance being the just the could distribute the sace of his helps if he desired we so as.

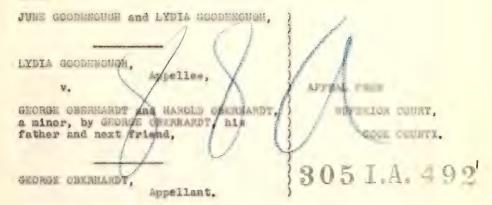
It is also claimed the sourt erms in motusing to rive an instruction tendered by defendants by which it was equipe to have the jury told that "it is incumbent upon the rightists in this cases to establish under influence by a preponderance of the evidence." We think there was no error in refucing.

The jury were told in substance by a number of instructions that before they could find the testetrix was mentally incomble of making the will or that undue influence was used, they must believe these to be groven by a preponderance of the evidence. And in an instruction given at defendants' request, the jury were instructed that "The law precures every person of legal age has surficient wind and memory to make a valid will and easte upon those who contest wind and memory to make a valid will and easte upon those who contest wind and memory to make a valid will and easte upon those who contest wind that the word feathblish as used in the offered instruction was unobjectionable, we think the jury were sufficiently instructed out and unobjectionable, we think the jury were sufficiently instructed out.

Upon a consideration of the record we are of epinten that no error complained of was of such a character as would warrant us in disturbing the verdict or the decree.

The decree of the Circuit court of Gook county is af-

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MR. JUNTICE O'COMMON DELIVER OF THE OFFICE OF THE CARRY.

Lydia Goodenough in a personal injury and a verdict and judgment in her favor for 13600 against deorge Oberhardt, which he seeks to reverse by this appeal.

The record discloses that about 3:30 o'cleck in the efternoon of October 3, 1937, June docdenough was driving her ford automobile south in Laranie street. Wer mother, Lydis Docdenough, as in the car with her and as she was crossing outer avenue, as sait and west through street, the car collided with as east-bound Chrysler automobile belonging to defendant, George Oberhardt, and selven by his son marold. Foster avenue, which is located on the north side of Chicago, is a preferential street - there are four lanes for traffic. It is intersected at right engles by Laranie street, which has two lanes for traffic. A "top" sign is located at the north-west corner of the intersection.

Plaintiff's position is that the Ford our stopped at the "Stop" sign and was defendant's antomobile traveling to to di miles per hour east in the south lase in Foster avenue, about 300 feet west of Laramie atreet. The Ford then proceeded across the intersection and was struck by the eastbound car and both cars once to a stop at the southwest corner of the intersection.

On the other side, defendant's contention is that when

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The record discloses that about 5:23 o'clock in the offerin the our with her and as an eas eroseing Foster avous, an eastand most through street, the ver relilies with an east-bound thrysler
bits son Harold. Foster avous, which is located on the nerth cide
of Chicago, is a preferential street - there are four lanes for
traffic. It is interpreted at right angles by incode at the northbas two lanes for traffic. I "itop" sign is located at the northvest corner of the interpretion.

laintiff's position is test the Ford stopped at the First sign and saw defendant's sutemobile traveling 40 to 48 miles per hour east in the south law in Faster avenus, about 300 feet west of Laureis Street. The Ford then proceeded ascens the inter-section and was struck by the easthound our and hoth care came to a section and was struck by the easthound our and hoth care came to a st the nouthwest corner of the intersection.

defendant's automobils was about 100 feet vest of the intersection the Ford was about 80 feet north of the intersection, both traveling at about the same rate of speed; that Harold, the driver of defendant's car, centimed on and when about 20 feet from Laranie street, the Ford car which was about 15 feet north of Foster seemed to be slowing down - did not stop, but on the centrary, increased its speed, and as a result the cars collided.

the daughter, who owned and was driving the Pord car, and her mother, brought suit against deorge and Harold Derhardt. The complaint was in two counts. The first was for personal and property injuries sustained by the daughter, June, and the second for personal injuries sustained by the mother. Defendents filed answers and counter claims, Harold seeking to recover for personal injuries sustained by him, and George, the father, for damages to the Chrysler car. The jury found both defendants guilty and assessed damages at 12600 in favor of the mother, Lydia. Afterward on motion of plaintiff the judgment against Parold, the son, was set aside and the suit dismissed as to him. The jury also returned a verdict finding June was not guilty as to Harold's counter claim.

The only matter argued on this appeal is that the judgment against the father, George Oberhardt, is wrong and should be reversed on the grounds, (1) that Harold was not the father's agent at the time in question; (2) that the court erred in refusing to permit Allen Freeman, a lawyer who was assisting in the defense of the case, to testify; (3) that there was error in the instructions; (4) in the remarks of the court; (5) in the remarks and conduct of plaintiff's councel, and (6) that the variet is excessive.

(1) The evidence shows that Hareld, who was about eighteen years old at the time of the accident, was driving his father's car "coming home from the sefety lane. By father didn't send as, nobody did. I went there on my own business." He testified he took his father's car and drove it whenever he wanted to do so; that the father paid for the repairs, license, etc.; that

defendant's subpackle was about 100 feet west of the intersection, beth traveling the Ford was about 40 feet north of the intersection, beth traveling at about the same rate of speed; that Parold, the driver of defendant's about the same intersect, and on and when shout 's feet from intend either the ford our which was about 10 feet north of Seter secred to be about down - did not stop, but on the centrary, incre-sed its threed, and as a result the care collises.

The famplier, who owned and was driving the Test aug, and her molius, brought out against decays and foreign and foreign the brought in the country. The first was demperary and the second for personal injuries sustained by the daughter, done, and the second for personal injuries claims, handle secing to reserve for personal injuries sustained by him, and heavy, the fedier, for damages to the Corpsies car. The jury found both defendants guilty and savered develor to sear the first the judy found readent Wester, we returned an etales that the judyment readent Westeld, the sea, was set aside and the tutt disminsed as to him. The jury clay returned a vertice timber out the was not railey and the feather of the sea, was set aside and the

The enly detter argued on this appeal is that the judence equine the father, deerge therefor, is wrone and chould be reversed on the grounds, (1) that the court erred is refusing to greatly in the time in question; (2) that the court erred is refusing to preside it is the detence of the case, to testify; (3) that there was exclosing in the instructions; (4) in the remarks of the court; (6) in the remarks and conduct of plaintiff's coursel, and (6) that the require is exceptive.

(1) The evidence shows that Darold, the was about elighteen years old at the time of the accident, was driving his send as, mebody file. I went there on my own business." In testi-

on the day of the accident he took the car "to have it tested to comply with the rule of the police department, and to have a sticker put on it to show that it was armained." We think this evidence was sufficient to show that Marold, at the time, was the agent of his father.

(2) Jaintiff called John Bronold was testified he was the accident and that the Ford car stomed at the north side of Poster avenue. In cross-enacination he was asked by sounced for defendant if someone from counsel's office had not tole housed him yesterday and he answered, "Yes, sir. " . "A young man by the name of Allen Freeman colled you on the telephone --. " This was objected to by counsel for plaintiff as being impaterial. The objection was overruled. The witness then said someone from defendant's souncel's office called him "Last night," and he did not may that he did not see the accident but that he teld the serson on the telemone just what he had testified to on the stand. The case then proceeded and afterward defendant called witnesses, one of whom was the young attorney Allen Freeman. Counsel for plaintiff objected to the witness testifying because he had been in the court room although the court had, on motion, ordered the witnesses to be excluded, and he was not permitted to answer. We think it clear the ruling was erponeous. Then the rule excluding the witnesses was entered no one could have foreseen that Freeman would be called to testify and this did not develop until the witness Bronold was on the stand. The chief point in controversy on the trial was whether the Ford automobile stopped at the north side of the intersection. Itnesses for plaintiff testified that it was stopped at that point. Un the other side, a number of witnesses testified that the Ford did not stop at the intersection. Gronold testified he saw the collision and that the lerd car was stopped before entering the intersection. It was sought to prove by Freeman that the night before the trial Bronold had told Freeman he did not see the accident. The ruling of the court was erroneous and under the circumstances, prejudicial.

on the day of the cocident he took the out "to neve it trated to vith the rule of the police depositment, and to brow a withher put on it to misw that it was exacted." 'a think into evidence was waitleient to show that Mareld, at the time, was the start of his

Piataciff called John Propold was restifice the you The sections and that for Ford one storred at the rorth will will a Forter avenue. On orose-ennalsation he was sained by coursel for ald landdyels? for hed mottes offerment and telephone this weatherday and he snewered. "Toy. "is." . ". yours me by the name paintiple trees will " .-- exployed at a see helies marrey well to to by coursel for classical as being immedial, it's objection use overvied. The witness them and semeone from defecteat's manmont's Too bill of this yes sen bit of her ", Their spain and bolles coities see the accident but that he told the normen on the telephone for the half testing a self the stant. The case then proceeded and ofterany defendant culled witnesses, one of whee was the young attarney Alien Presung. Counsel for plaintiff objects to the wite and it well's area respond to the contract course of the contract and the contract of the cont court had, on motion, ordered the witnesses to be excluded, and he one not personally be enough, to Died II that the reting one has vilted of ballac as almou assert Just ansert blue blue this did not downless until the witness froncil out on the class, The chief roint in controversy on the trial was when the fore automobile attorned at the north side of the faversention. . Two ones for glaintiff testified that it was stepres at the coat. other side, a number of witnesses testified that the Ford til act stop at the intersection. Broncia (ertified be our the collision and that the Payl has one stagged nefter namera, the Lebessetting, Lit's sid stoled their and that the the before of Jigues ou ti mental had bell frequency he did out one the sections. The rolling of the tentre one erronesses and paner has appearing one future bay be

request as to the right-of-way of vehicles approaching an intersection. The complaint is that the statute which was embodied in
the instruction cose not apply where there are stop signs at an
interesction. The jury had the right to be told, as they were by
the instruction, that under certain cricumstances mentioned in the
instruction, vehicles approaching interesctions from the right had
the right-of-way over those approaching from the left, and this rule
was not changed by the fact that there was a stop sign at the intersection.

The other objections urged by counsel for defendant as to the remarks of the court and of plaintiff's counsel, and that the verdict is excessive, we think need not be discussed here, since we have reached the conclusion that there must be a new trial on account of the error in refusing to permit the witness, Freezan, to testify.

The judgment of the Superior court of look county is ze-

REVERSED AND REMANDED.

Matchett, P.J., and McSurely, J., concur.

Infendant nouplains of an instruction given at plaintiff's at as to the sight-of-any of vehicles appreciate an interacution. The complaint is that the statute viet was embalisd in the instruction does not exply share there are stor digns at an inter-acution. The jury had the wight to be vold, as very very ty the instruction, that under cartain eriomentances mentioned in the instruction, there was a crossences mentioned in the was sufficient the section of that these was a for eight at the inverwas not changed by the fact that there was a for eight at the inver-

The ether objections used by councel for defending as to the remarks of the county of the concentration and the first continue to the conclusion that there must be a new trial on account of the error in refusing to parmip the citness, fromma, to conclus of the error in refusing to parmip the citness, fromma, to county.

The judgment of the court of Coek count of Coek county is no-

The same services and the services are the services and the services and the services are the services are the services and the services are t

Matchett, F.J., and McCurely, J., concur.

40937

AUGUST BLOCK,

Appellant,

V.

W. W. KIMBALL COUPARY, a corporation,

foller.

MANAGE AL GOLDE

OF BITTING.

305 V.A. 492

MR. JUSTICE COCKON DILLIVE AND THE OPINION OF THE BOOKT.

Finistiff brought as action against defendant to recover \$10,407.20 claimed to be due under the terms of an eral agreement. There was a jury trial and a verdict in plaintiff's favor for \$2,000. Defendant moved for judgment notwithstanding the verdict and at the time also moved that in the event such motion was decied, that it be granted a new trial. Afterward plaintiff, by leave of court, filed his motion for a judgment in his favor for \$10,407.20 instead of the \$3,000 awarded to him by the verdict of the jury. The court sustained defendant's motion for a judgment notwithstanding the verdict and plaintiff appeals.

by defendant in the making of pianos. He centimed verking for defendant until about February or March, 1930, when he left the company. When he was first employed he "was doing cabinet work on the bench making grand planes," and continued at that work until 1923, at which time he was made foremen of the department. He continued in such position until about Reptember 24, 1927, when he entered into an oral agreement with defendant whereby he was to be in chart of the department. He was to be paid certain specified prices for the work completed in that department, out of which he was to pay the wages of the nen (around 30 in number) and what was left and to be paid to him for his compensation. There is no dispute about the oral agreement except that defendant's position is that he was to be paid, as above stated, but not to exceed 450 per week, while plaintiff's position is there was no such limitation.

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Parkist brought an action estines intendent to recover 10,407.TO sintend for brought the terms of an onel agreecedt. There was a jury trial and a verdict in plaintiff's fever for (X,000, forentant moved for jadenest notalthrisading the verdict and at the time also moved that in the event outh motion and denied, that it is granted a sew trial. Alternate plaintiff, by Irave of rourt, files his motion for a judgment in his favor for (17,407.50 instead of the fact of the jury. The court the (3,000 amarded to him by the verdict of the jury. The court

The record displaces that plaintiff in 1912 was employed Passage water cloud Valorance or raper, limi, when he had not not once then he was figed employed he "yes about suchast was en the COLUMN TOWNERS PERSON DECOURAGE SINGLE COURS COURS COURSE E. CO. at which time he was made forecame of the dejectment. He continued in own pecition with about beyleader bt, inch, then is obtained wate at an et ase en grovene tankesteñ dite tramporpa into as cial he was to be raid overain accertical union furof the department, The work completed in that department, out of which in rea to pur of the filed and the bar trainer at the braces have all to trapic the be paid to him for his commandies, there is no diverte about it If you mi hard at madding a toucherted Judy Japane Thomseyld Long Alithe these can left during of for first before weeds on thing of on its rec reser of entries a Villolate

The evidence shows that every to works rlaintiff made out the payroll showing the amount sarred by each am who worked in the department; the amount to be aid by defendant for each aposified nisce of work; from the total of these prices, the men's wares were deducted, and the balance reasining was paid to plaintiff. For eample, the first payroll made by plaintiff under the oral agreement shows defendant company was to pay 2811.53. The amount the men had carned during the two weeks was \$2116.05. leaving a balance of .98.48, which was paid to plaintiff. The nen were also paid by defendant the amounts specified in the payrell. Plaintiff continued in this work from September, 1987 until December, 1986, when he was somewhat demoted and Kerman N. Kunde, who had been an employee of the company for 34 years was sade foreman of the cabinet department. Two departments at that time were consolidated and from that time the payrolls were approved by Kunde. This without was followed from December, 1820 until sometime in January, 1930, when plaintiff was advised that he would have to go back to work on the beach. Chartly thereafter, plaintiff claimed he had not been paid all that was coming to him under the terms of the oral contract and he testified he presented defendant with a bill for 110,407.20, the amount for which he sued. A few weeks thereafter, plaintiff left his amployment and has not worked there since.

Three witnesses for defendant denied that plaintiff's claim was presented to them, as testified to by him. The substance of their testimony is that they did not see the bill until shortly before the trial, which was begun March 20, 1939. Plaintiff brought his suit on January 24, 1935.

The bi-weekly payrolls, all of which were made out by plaintiff beginning Cotober 8, 1927 and the last dated January 25, 1950, show the amounts paid by defendant to plaintiff every two weeks covering that period and nearly every bi-weekly payment made to plaintiff was 199 and some cents, except the first payroll shows he was paid 195.48 and a few others were approximately 198. The avidence shows the number of hours worked every week by plaintiff.

The evidence chors that every two weeks pleintly and out the payrell showing the enough series by each men she wanted in the department; the excust to be said by defendant for each securited piece of work; from the total of these prices, the week cames any definited, and the balance remaining was paid to claimits. For arthe same for add many tidalely to abou Horgen Sault out , signs shays defendant enegany was to pay 18911, Il. The securit the sen had earmed during the two seeks eas (2018.09, leaving a bilance of 185.45, which was paid to plaintiff. The was were also said by tefendant the emounts specified in the payrell. Plaintiff continued in this work from deptember, lift until teconion, 1916, when he was somethat described and Mercan it, funde, the hest been an employee of the commany for the years was and foremen of the cabinet department. mets sens word but hatchilonnes or m and fadd in etnesting the the parently were appeared by Locks, Tells serious was full county years Secember, 1988 until sometime in January, 1880, when plaintiff was advised that he would inve to go back to very on the beauty, therety therenfor, plaintiff claimed he had not been paid all that was positions and has seasoned less and he same and me season and of paintee he presented defendant with a bill for 110,407.20, the smount for shield he saed. A few works thousanders, shiftedlift here all should be seen as and has not worked there edner.

the was presented to them, as testified to by him. The substance of the trial control was begun sareh 10, 1000. Plaintiff brought his suit on January 24, 1985.

The bi-weekly payrelia, all of which were ande out by latter's beginning Coteber 8, 1987 and the lest dated January 28, 108, show the count of the first persons as in latter for the first payrels charge latter for the first payrels charge latter against the first payrels charge same center same count the first payrels charge.

They vary from 104 hours down to \$4-1/1, \$88, 70-1/2, and one but 31-1/2 hours but an each occasion he was paid substantially the same amount, a little more than 199. On one of the payrelia, July, 1928, he was given two checks for his two weeks' work of 182.90 each. A witness for defendant testified he called this to plaintiff's attention and that he should not again go over the 100 for two weeks' pay. This testimony is denied by plaintiff who explains be drew the two checks so that the other sen who were being paid at the time would not know he was drawing over 100 because if they did they might be dissatisfied with the amount they were receiving.

Plaintiff's testimony is further to the effect that from Leptember 24, 1987 until about January 38, 1980, he never make any demand or said anything to defendant that he was satisfied to more money than he was being paid as shown on the bi-weekly payrolls and that the reason he did not was that he was saving the money so that in case there were slack times it could be drawn against by defendant to pay the men.

The evidence as to the making of the oral agreement in September, 1987, is that plaintiff, Sunde and Hussby were present, the latter two representing defendant company, and, as stated, there is no disagreement in their testimony except on the point that plaintiff says there was no limit of \$50 per sech placed on the amount he was to recover, while on the other side, Bussby, who was the production man and superior to plaintiff and Sunde, and who had been in the employ of the company for 42 years, testified that the maximum of \$50 per week was placed upon the amount plaintiff was to receive and this is also the testimony of Kunde.

On the trial, on cross-examination, Number testified that shortly before Block left defendant company in February or March, 1930, he checked up what had been produced in the department in which plaintiff was employed and that "As near as I can remember, the surplus was about \$5,000.00, the accumulative. That consisted of various parts of grand plane. There were some complete cases. As to how many I would have, """ to trust my memory, I could not answer

they very from 10% hours down to 04-1/2, 5%, 79-1/2, and one hay 21-1/2 hours but an each accession he was paid substantially the same snount, a little more than 185, do one of the payrolis, 1417, 1273, he was given two checks for his two weeks' word of 187.92 each. A sitness for defendant testified he called this to plaintiff's attention has that he should not egals yo were the 150 for the two weeks' yey. This testimony is denied by plaintiff who explains he from the two objects were being paid at the time two objects as the two objects of the transition were being paid at the time they would not know he was drawing ever 1103 because if they did they will be disactiated with the unembt they were receiving.

Plaintiff's testiment to further to the effect that from deptember 26, 1277 until about lanuary 25, 1257, he never make any denous or said capthing to defendant that he was entitied to dope denoty than he was held paid as shown on the bi-seekiy payrells and that the reason he did not use that he was saving the money we that in case there were class than it could be drawn expinet by infendent to pay the men.

The avidence as to the medias of the oral agreement is deptember, 1807, is that plaintiff, sunds and durably were present, is no disagrances to that plaintiff and disagrances as the plaint that of 180 ger west placed on the anount he was to recover, while on the ather cite, Sucche, who was the production man and superior to plaintiff and Sande, and she had been in the employ of the company for 42 years, testified that the mailent of the company for 42 years, testified that the mailent of the company of Again the assumt plaintiff was to receive and thin is also the testionary of Again.

On the brial, on orese-exected, hunde testified that short chartly before Misch left defendant company in February or March. 1920, he checked up what had been produced in the department in which plaintist was employed and that "he near as I can remember, the

that carrectly. I did not wake a written memorandum of it at that time. That figure was in my memory."

The defence interposed was (1) that plaintiff had been paid in full, and (2) the Five Year statute of Limitations barred plaintiff's claim. It defendant's request the court instructed the jury that defendant had pleaded the statute of Limitations and therefore plaintiff could not recover for such amounts, if any, as they found became due to him "within five years before the commencement of this suit which was on January 24, 1935."

(1) Defendant contends that the record discloses plaintiff has been paid in full; that the bi-weekly payrolls made out by plaintiff, covering the 28 months he worked under the cral agreement of September 74, 1927, shows plaintiff was paid approximately . 3 and some cents every two weeks and that this source of dealing between the parties show the construction of the oral agreement placed upon it by the parties, viz., that plaintiff was not to receive more than 150 per week. In further support of this contention counsel for defendant say that prior to the oral agreement plaintiff was working in the grand cabinet department for 90 center an hour and at that time worked 52 hours a week, so that his weekly wages were 46.80; that under the oral agreement, as testified to by witnesses for defendant, plaintiff received approximately las month more than he was paid prior to that time - about NOE per month, while under plaintiff's version of the oral a reseast, plaintiff would be receiving 1874 a month, or an increase of approximately 1371 per south and that such result shows plaintiff's version of the matter to be wholly without merit. In this connection we night say that plaintiff, during the time he worked under the oral agressent, draw .6.066 as appears from the payrolls made out by him, and in addition to this sum he seeks to recover [10,407.20 more, or as seditional \$371 a month.

On the other hand, counsel for plaintiff say the increase in pay which plaintiff claims he was entitled to under the oral agreement, is entirely reasonable in view of the fact that the

that correctly. I did not rake a vettan mereseakin of it at that the. That figure was in sy manary."

The defence interposed was (1) that pinted has paint to been paint in twill, and (2) the Five Foar itstude of idelections carried plaint thiff a claim, it defendant a request the court isoterated the jury that that forestant had pleaded the itstude of idelections and Carerone this plaint if any, as they found plaintiff could not recover for such amounts, if any, as they found became has to him "within five years before the commencences of this could when an January 24, 1875."

"It! Delyslank surfaces who the property desirables (11) go the of an elforges yfdowe-id self tady (flot of bing and and this Interesting Little out values justice and advisor life out payments, Willially, the agent and agent of the part of the party of the party of the -m praises to sever that that his more our gross when here his Jan weren lure and to moissurfance add were selfung add nest placed upon it by the parties, vir., thut claimiff mas not to receive more than 187 ger week. In further august of this contena-Transcered fire out of rolly that the traine to be lecture not some Od not sample and denides bear not at patrice say Tribalate office ald telt on . Now a stand at before and taif to has took as wages were 146.00; that under the erel egreenes, as tellised to a TP. yfuturinen for defendant, plaintiff received appropriate by month more than he use talk retar the time - speet (202 permonth, while ender plaintiff's version of the east serversel, plaintiff would be receiving 1874 a month, or an increase of arregularity one to actore of this state sweets classes done that has also the test IVC. you find on and persons what at ", Proce Process Thinks we se There are that plaintiff, during the time to worked under the ovel agreement, drew .6,086 as appears from the payrells made out by him, and in the per to prove 40,700 july specious of before all more will be published .dtsor s iv-- i--

services, was and described Abb. Section Version and a sec-

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thirty-old are sapleyed in the department where plaintiff worked must be paid first before he would receive anything.

Plaintiff testified he made no claim for additional compenestion during the 23 months he worked under the oral agreement. This fact, taken in connection with all the evidence in the record. we think, clearly show that the vertice of the jury, which apparently adopted plaintiff's varsion of the oral agreement, is against the manifest weight of the evidence. If this were the only error complained of, the judgment would have to be reversed and the cause remanded for a new trial but we are of opinion that proticelly all of plaintiff's claim was burred by the live year to tute of Limitations. And although the court instructed the jury, as above stated, that if they found for plaintiff they sould only award such compensation or such amounts as they found became due to him "within five years before the commencement of this suit which was no January 24, 1935. The verdict is in the teeth of this instruction because five years before the commencement of the suit would be approximately January 25, 1930, and plaintiff earned nothing under the oral contract after January 25, 1930.

In Filler v. Sinnason, 168 Til. 447, it was held that in a suit brought on an oral contract to recover wages at 16 a week for services rendered from August 1, 1882 to March 30, 1897, the Five Year Statute of Limitations, which was interposed, barred recovery for all wages claimed to be due five years prior to the bellanian of the suit. In that case plaintiff, a sister of defendant, worked for him on a fare and claimed 15 a week for her services. The cought to recover for a period of nearly ten years. The contract was oral. The court there said: "The appelles [plaintiff] was only entitled to recover for services rendered within five years prior to the date when the suit was brought, *** unless she could show some new promise on the part of appellant sufficient to take the case out of the Statute of Limitations." Defendant requested instructions on the Statute of Limitations which the court refused and this was held to be error.

Thirty-olk mea ouplayed in the department where risingist rengel must be paid first before be usual people estating.

-une fameifibbe not alais on ohan ad Laitions Titalais peneation during the St months he worked union the oral agreement. This Part, taken in commetion with all the existence in the record, we think, elearly shove that the verties of the jary, which approachly singled claiming! a worden of the control of comment, is applied that manifort which at the cyliches. If this were the only error ourplained of, the judgment would have to be revereed and the esuae II. This is the fact to be an out the late was a rol hebraner of plaintiff's claim was berred by the live lear literate of liniterions, And although the court instructed the jury, as above entract, that if they found for plaintief for real only made and companiention or such amounts as they found become due to him within five years before the comescenses of this suit which was on January 24, 1985, 4 The verdick is in the test of this instruction because flye years before the commonsent of the cuit would be appreciately Jenuary 25, 1900, and plaintiff samed nathiat under the oral seatract after James 25, 1050,

In Miller v. Himmon, 160 Ill. 447, it was held that in a suit brought on an eral contract to recome mapes at 18 a meek for services rendered from Aquet 1, 1800 to rayed to, 1800, one Five Year Statute of Identisticae, which was inverpensed, harved recovery for all weigs claimed to be flue five pears prior to the beginning of the suit. In that case plaintiff, a stator of defendant, werked for his on a ferm and elaired at a week for her cervices. The contract we crait to recover for a period of nearly than years. The contract we crait. To recover for services rendered within five years prior to the date when the suit wer inverse wall when the suit wer inverse and of the Statute of the part of appellant sufficient to take the case out of the Statute of limitations and requested instructions on the Statute of Limitations which the court requested instructions on

In the instant case, plaintiff testified that the records which he kept and which are in evidence, most the amount of work completed in his department, and that upon such completion he was entitled to be paid. The evidence shows substantially all of the work has completed and delivered sore than five years before the suit was brought. And as said by the Supress court in the miller case, "he do not think the evidence shows a case of sutual accounts."

Counsel for plaintiff contend the statute of limitations has no application to plaintiff's claim and o'brien v. caton, 140 Ill. 617, is relied upon. In that case, o'brien brought suit on a contract upon which payments had been made at different times. The question of the statute of Limitations was the controlling point in the case. O'Brien entered into a contract with exten to provide all material and perform all work in plastering a certain building then being erected by lexton, for which C'brian was to be paid 19900 in installments as the work progressed. I rien did not somplate the work claiming he had been prevented from doing so by Sexton. On the other hand, Jexton contended O'Brien but abandaned the work and he was required to finish the job at a cost greater than the contract price. The court said that the last war fann by divien was one day less than five years before he brought suit; that the work to be erformed by "brien for exton "was an entirety: " that "where one continuous piece of work, consisting of a number of parts or itses, is to be rerformed, the statute of limitations does not begin to run upon the completion of each separate part or item, but upon the completion of the whole." se think that case is not in point. There O'srian was to be paid for completing the jeb 2000. while in the case before us, plaintiff was to be gaid by the piece. as and when the work on the pieces was completed. This is shown by plaintiff's testimony and by the method in which the business was conducted. We think the Five Tear Statute of Limitations barred plaintiff's claim and therefore the court did not err in entering judgment in favor of defendant notwithstanding the verdict.

In the landent of a vision of the land that the manner of work completed the cape and which are the evisions of work completed in the department, and that upon such completion is not one completed to the paid. The evidence chose chose continuity all of the upon an completed and fallywared note than fire years before the oute the brought. And as oald of the Surrane court in the littles come; "no brought, and the ovidence there a case of motual accounts."

racitarial le engare el Austre Tiraleis mel foramo has no application to plaintiff's claim and living v. Jerton, 240 ill. SlV. is relied upod. In Wat same, C'Srien brought sail on confract upon which paper she had here as de different times. ni bulow priflogings out now accidativily to especial and to policeny the case. C'hylen estevel into a carrect with depten to recylin partified alabase a garretral g at from the moreon has labrades the tion being erected by jexten, for chick disting was to be rade esas in his taliant as the wark erograssed. I been did not come plote the work olaining in) we arreverted from doing so by Sentes. De the other hand, "exten contended o'bries had abandoor maily astrong these is det aut datait to beinger and on how drow will the contract write. The court said that the last work does by thirty enit stati tilus rispecte en enatet anno evil andi seel tab one see and the parternation of the termination of the analysis of the where one continuous place of work, sendinging a number of years ar team, is to be performed, the contents of limitations once not degin to run agen the completion of each securets part or item, but al son at once fady which of the adapt out to authorized out more paint. There Offrich one to be paid for coupleties the job 18090. while in the case before us, plaintiff sas to be paid by the gloss, as and when the work on the cioosa was completed. Tale is shown by and uponious and notice at boule as all yallan quantitate at thininks conducted. We think the Five Year Prayage of Links of . Seconduced paintiff a data and thousand or o'terest and artiffications . In these add not be about the an areing the to account at themsbut

The judgment of the Eunicipal court of Chicago is affirmed.

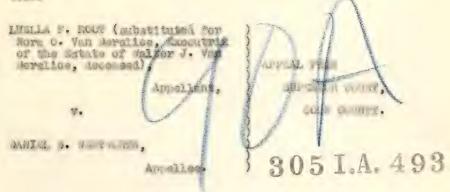
JUDGHENT AFFIRED.

Matchett, P.J., and MaSurely, J., concur.

the judgment of the discrete court or transfer aft

America.

dechett, i.d., and hollusely, i., cenour.



MR. PRESIDING JUSTICE SERIS E. SULLIVAN delivered the opinion of the court.

of the Satato of Walter J. Van Derslice, Maintiff, brought suit against Janiel B. Wentworth, claiming that an Implement 11, 1826, at Chicago, Illinois, defendant made a provincer note in writing bearing that date and delivered the mass to Malter J. Van Derslice and thereby for value remained to pay to the order of said Malter J. Van Derslice the mass of 10,000.00 sixty days after date thereof with interest thereon at the rate of 7 per cent. per annua.

In the payment of said note end such default still continues; that there is due plaintiff from is a number on said note 3,494.11, being \$5,000.00 principal and \$3,484.11 for interest at the rate aforesaid.

A cognovit was filed by the attorney for defendant, waiving service of process, confessing the action of plaintiff for the above much amount, being principal and interest on said note and also such attorneys fees as the court may allow.

Thereafter on Cotober 19, 1935, an order was entered by July Felly, directing that julyment with execution be entered for plaintiff and arminet defembent for 18,000.80 and costs, which





I STOVETON AND LANGE OF A SAME DOLLER WITH MALL A BOY ! the cointent of the courts.

Collbar 18, 1978, More P. Wes deeplace, Miscontrate of the nature of victors of the meeting, plantered, by melicare, so pair paintale, difference of Jales faming & fire 11, 1905, at distance, Illiands, hedenkent made a provincent of one of heaviled in oth fait galand goldfor Hi even delier i. You depalted this for the volue received reunland to see our opinged new . Legalist him to waine and at you of ACRES OF THE PROPERTY AND ADDRESS OF THE PROPERTY OF THE PROPE -municus war, -days wor, T to nation and the

PARADILLE SOUTH SOUTHERN VAN COLUMN TWO CONTROL TO d will the unitary fifth a function down have been also be demorged out the there to the laintiff from deferted on anil note 15, let. 11, being \$5,000.00 principal and \$3,464.11 for interest at the rate aforesald.

A POLICE AND TO THE REPORT OF THE PROPERTY PORT OF TRUES TO BE Wilselify to midde oil principus, propery is colore yelvior And in Provide Ann Indian grant Penne Same was not bell will CHILD THE PRINT HE AS BOY TYPEWENT'S AND DESIGNABLE STOR

lorester on tereber 18, 1885, an order was entered by Joing Kelly, directing that Judgest with executive is entered mm includes \$506.71 as attorneys' foes.

on November 12, 1936, the limited and special appearance of defendant, by his attorneys, was filed for the cole purpose of making define and of said late on motion be repose of giving any jurisdiction over the person or property of a lidefendant prior to said date or wriving any because defend of has to the jurisdiction of the courts prior to his motion to command set saids and judgment as being void on without parity.

On December 4, 1936, Judge Bristow entered an order directing that said judgment by confession be opened and giving leave to defendent to file instantor his answer to the complaint; directing that said judgment stand as security; that execution be stayed until further order of the court, and that definite never leave to file instantor a demand for a trial by jury. On Secondar 5, 1936, plaintiff filed a demand for a jury.

tow entered an order striking defendant's warmer and ordering defendant to file an amended ensure on or before february 1, 1937.

Defendant in his amended answer filed February B, 1937, admits that on deptember 11, 1926, at thicker, Thinkels, he note a certain promissory note in writing, bearing said late, for the sum of 110,000.00, with interest at the rate of seven per cent per annum, and delivered the ends to Walter J. Van Derslice, but denies that he received any value or consideration for said note; alleges that the supposed promissory note of the derendant has been paid in full by the Tromwood Syndicate, and Indiana Corporation, said corporation being the real debter, beneficiary and recipient of all the consideration for which said note was delivered; that said payment

in commons 18, 1979, the limited and appeals of sommers of lateriors, by his aviamers, we filled for the sale purpose of softing decimals on soil lets and not for the common of giving any justistical even the person or proposed will established be said date or weighing any distance decimal at the form to the furtisdiction of the courfe prior to id; notice to court any weil and the court as the indicate to court and weigh and the court of the court and the cour

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a cartain presidency note in writing, boaring call sole, for the thet he received any value or consistention for anti- note; alleged that he enjoyed president note; and the definition of the lawness that is intensively and the initian Corporation, said to that it is lawness to the call of the lawness to t

in full of cala note consisted of the syment of S. C.C. in each by said fromwood symilarie to plaintiff's Lent tor, and by the issuence to plaintiff's testator of 5.3.0.00 corth of stock of said from soi lyndicate, and about being received and accepted by minintiff's testator in lies of the balance due on said note; that said stock was issued and accorted with a premined universanding that the plaintiff's testator night have the right to surrender said stock from said Dyndigate one in a mortulum to re-sourchase the seme; that the supposed priningery note of defeabint aforguid, man presented to have been surronieved and lastroyed on the Assuence and acceptance of said stock by plaintiff's testator and that defen but assumed this had been done, until he was advised to the contrary, some time after the denise of plaintiff's leather: that defen ant ruc ived no part or benefit of the employetten for which the promiseory note such upon berein was belivered; that the Ironwood lyndicate unid said promissory note in full, as aforesaid, \$5,000.00 in each and \$5,000.00 in stock as will more fully asmear in the records of the Tronwood Syndicate and by witnesses having knowledge thereof.

Supposed promissory note of defendant was only conditional; that when said note was executed and islivered by him, certain persons, including plaintiff's testator and defendant were interested in procuring title to some decourse of land in Cary, Indiana, for the purpose of forming a corporation, to be known as the Ironwood Syndicate, through which said land to be subdivided and sold; that said from of persons were raising money at that time, for the purpose of persons were raising money at that time, for the purpose of persons title to said property; that plaintiff's bestator agreed to be one of theoriginal investors and agreed to savance the sum of Olo, occord to the proposed syndicate for such

in full of call note consisted of the population of the ments of cash by said Evenued Symiteria to rintalift a testator, outly the tearnes to plaintiff a teatables of fightly to come of the or and Ironance Symilarie, and school being received on a conserval taken the see constant at the main ten and the contract of Thinksle we The dayshed being by a life heligood has been it our foote him being the that the claim that? I tentatur might have the right to now more made state from the state of modelines and the standings fine make doors from ror Alegorale Inchested to don greenland Encopye all Itali town promoted to have been supposted to the landscorped and ordered sind anagotant of libinially of funds bits to compress bits wis of Louisia see to iting , saoi and Lad aid Lacemes that notes THE PERSONAL PROPERTY OF SELECTION OF SELECTION AND ASSESSED. mit multiwaldens will be fifteened by Proc un Retilient die teld Call Therewiller has blocked lengt some both games, out to be wood dynilon's paid guid promissory note in full, on aforesting Trough affire over this on about it wis all in shee at Maddity The in the precessin of the Immedia for the line of the citizenesse hering PERSONAL PROPERTY.

definition to the state of defending the plant conditional plant the supposed promised to be of defended with only conditionally blast the subit note was sometic and telephone by high orders were interested in procurational plants of tent of the properties to area did notes of tent in deep, Indiana, for the properties of formalist a companient of the bases of the state of tent of the properties of formalist a companient of the bases of the bases of the properties of the properties of the properties of the properties and appropriate to the tent of the properties and appropriate to the state of the state of the properties and appropriate for each statement the state of the properties and appropriate for each

purpose, upon the condition, however, that he would receive a quaranter of reinbursement in once the said processed frontood by microte should fail to incorporate, or if said synitrate should fail to obtain title to said lend under some form of organization for such purpose; that plaintiff's testator and defendant, as well as all the other original incorporators of the frontood synitrate, know of the foregoing conditions upon which the consideration for said note was based, and knew that said alvancement of 10,000.00 was not for the use of defendant but for the use of the proposed syndicate in obtaining title to the land aforesaid.

sideration of said advancement of said 110,000.00 by plaintiff's testor to the proposed syndicate, it was tentatively understood by the original incorporators of said syndicate, that deceased, by reason of said advancement, should receive a best of 5,000.00, to be paid out of the first profits of said syndicate; that on May 20, 1927, the proposed fromwood syndicate aforemed was in fact incorporated under the laws of the State of Indiana, and that shortly thereafter said fromwood syndicate acquired title to the 400 acres of land, for which purchase of land plaintiff's testator had alvanced the aforesaid sum of \$10,000.00; that all obligations of defendant upon which said note was conditioned, were thereby fully performed and satisfied and defendant was released of all personal liability on said note.

deformant's amended enswer further alleges that, for a further and severate defense, the cause of action stated in the con laint did not accrue to plaintiff at any time within ten years next before the commencement of this action; that the supposed promissory note of defendant herein such upon is lated September 11, 1996; that said note is in words and figures as alleged by plaintiff and contained a surrant of attorney to confess judgment " at any time hereafter"; that at the time of the filling of the isolaration herein

purpose, then the manifolm, forevery that he could massive a granulation of makeless of makeless in one the aris project promise of makelesses in one the aris proling of manifold fall fail that it is a supported to the aris openisate of all the obtain title to aris include man form our form of openisation for anoth purpose; that plantalists tentions out to looke the openisate, as well the other oriestal incorporations of the looked openisation for the aris to looked of the language of the suppose of the transfer of the suppose of the transfer of the parameter o

further and separate defines, the comes of action sinted in the further and site for priors action within the priors next before the descent of this setting that the represent producery before the concentration of this setting that the represent producery because of the continue of the

no cause of action existed under said alleged note, in that such cause of eation was barred by the statute of Limitations on deptember 11, 1935; that no action was brought by allenting or her testator assinst legement up a said note until the filing of this sait on Cotober 16, 1934, and that no circumstances exist marries the counting of the saitue of instances sould be telled, and that my virtue of the foregoing facts plaintiff's action herein is barred.

Defendant's amended answer further states that on totober 10, 1936, judgment was confessed by plaintiff a minat defendant upon the aforesaid surcess premissory note of latendant; that no serious was ever insted and no jurisdiction was obtained over defendant by his appearance or afternise, prior to the running of the statute of Limitations a first and alleged note; that defendent never consented to the entry of the judgment by confession aforesaid; that until becomes 18, 1936, no lawfel oppoarance was entered berein by defendant and no sources was issued herein; that said power of autorney, by virtue of the Statute of Limitations, had expired ton years after its execution, on September 11, 1936.

Defendant's amended answer states that for a further and separate defense, the said supposed promissory note of defendant was found among some miscellameous papers belonging to plaintiff's testator at the time of his demise; that for many years prior to the death of plaintiff's testator, defendant and plaintiff's testator had been office associates and had numerous financial dealings involving debits and credits of both parties, that during all of said intervening time, plaintiff's testator never made any demand, directly or indirectly upon defendant, either orally or in writing for said \$10,000.00, as mentioned in said note, or for any part thereof, or for any interest thereon; that said facts were known to plaintiff and that said note was

no cause of action exists maken put limpt mets in the make so deptember 11, 1975; that no action on is bruidet by Laintiff or less that the contract make make make make the deling library of the contract of the contract of the contract of the contract.

Inferious the consider manner further of the such a time on the theory of the such alleged to the mandag of the footest of the footest of the such alleged that such person of a termory, by virtue of a termory, by virtue of a termory of the analysis of the such and the mandage of a termory of the such and the analysis of the such as the analysis of the such as the

and found from the the the of "is decided the for many intiffs to the the the of the decided the for many

described in her inventory of her implemi's satate, as "volue Lambiful"; that is maint verily believes that claiming personally knew of the interest of her iscensed husbant in the 4th series of land in they and of the Ironamod symbolicate, which was incorporated for the purpose of sublividing and developing said land, because plaintiff drove by said land with her husband, since lessesed, many times and investigated the improvements being made thereon.

Defendent's mended answer Airther sets Jurth that by reason of the fallure of claimtiff's tostate to have some any dervind upon defea ant under the all aged note miel woo herein, when accountings were note between said loominged and the infinie ant, and by reason of the fact that brine his lifetime, incomed directed all his temands concerning publicate, to the Irangel lyndicate, defendent was led to believe and did rely upon a avesumtion that gold note was canceled when the conditions were which it was inlivered were fully performed and ordinated by payment of 3.000.00 in cash and the delivery on accordance of stock of the Ironwood Syndicate of the face and then market value of 15,600.00; that by virtue of all the acts and conduct of plaintiff's testator during his lifetime, defendant was bulled into inaction and took no steps to secure the return of, or to seek proof of the actual cancellation of said note; therefore plaintiff is estomed from any attempt to bring this note to life and to take judgment thereon.

A notion was filed February 10, 1933, by smella F. Hout, by her automoys, for an order substituting her as party plaintiff in said cause and likewise substituting her atterneys for the atterneys who had represented the original plaintiff. This notice, it is alleged, was entered in accordance with an artidavit, but said artifavit does not appear either in the abstract or in

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of Real Print Stee Seatist Steem Squares after a mine acted of separate a thirtief in position out to make t anterna norma home edun derralia edi asimu dan sedel nogu buomef which our to the feermood the seconded chase more equipmoons not and, seal by mesons of the fact that during his lifether, departured five most not at accomplishing galance man plannich and ille heterall word a norm give this isse emulied at Dol now Facilist gottoffere more emphisions and make the Ladaness are adon than took worth which the ear delivered never fully performal our activities by parame of 15 feet to come out the talkeny and acceptance of stock of the Irensed Synthacts of the fees and then market volue to womans and the continue of all the cots and continue of MATERIAL Law Analogous and particular to partie and stated affill parties is in a fraction and tuot; no stage to sweets the return of, on to gook preak of the solure consollation of out the step wignefore will at about the paret of Superior has noth bounded at Wildeliane to especially and a gradiential gradient gradient of the second

A mobion was filed Polymore, lt. 1919, by assile s. Houb,
we are areases are some representation and entailments.
Articles, it is alleged, was entered in according which are alleged to the distinct or the

the record, so we are uninformed as to how the now plaintiff, Lucile F. Rost, obtained either the note or the consideration given therefor. We think these facts or documents should have been submitted to this court for consideration. After a trial by a judge and jury on the lasues made by the original declaration and answer, as emended, the jury returned a vertice for \$5,000.00. Just what this vertice was based upon in the way of evidence, the record before us does not disclose. It is, so obviously, a compressive vertice by the jury that any further comments thereon are unnecessary.

We think the trial court was wrong in refusing to permit the defendant to testify, as no estate and no heir as such, is a party to the litigation and had no interest in it at the time of the trial.

As was said in dam v. May, 179 111. 490, at page 490:

"The lefement here was not defending as trustee, conservator, executor or administrator, nor as help, devises
or legates of any deceased person, nor as guardian or
trustee of any such help, legates or levises. Gags was
defining in his own right, as grantee of the executor
of the estate of Isaac N. Arnold. The statute counct,
by any fair or reasonable constructs n, be held to apply
to the grantee of an executor, heir or levises. Faulnar v.
Oillan, 31 Ill. App. 348; Leach v. Elebola, 35 Ill. 275;
Ganfield v. Flagmar, 212 Ill. 541.

It is quite apparent that the only issue than to be considered as whether or not there was a defense to the original judgment which was entered. The proper practice is to enter a judgment either for the plaintiff or for the defendant. As was said in <u>Belgrader</u> v. <u>Reflektors</u>, 963 Ill. App. 130, at page 140:

"where a judgment by confession has been opened and a trial had, and the issues found for the plaintiff, the proper practice is to restore the judgment by confession and not enter an independent judgment." However, Wenterelli, 200 Jll. App. 300 Jlll. App

the record, so we are untained in her the new plaintiff, levels F. Hort, o'reined dither the note on the constitution into the constitution of the constitution of the constitution of the constitution of the ordered for an interest of the constitution of the constitution.

We think the total court was meanly in retucking to penuit the defearm to testify, he we estate and no hair as each,

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These errors which were committed by the trial court were corrected by the subsequent action of the trial court in vacating the judgment and entering a judgment notwithstanding the verdict in favor of the defendant.

When evidence was offered by the defense, even with the restriction placed upon it by the rulings of the trial court in refusing to permit the defendant to explain the circumstances of the transaction, for which we think he qualified as a competent witness, no reply was offered by the plaintiff to sustain her position. The defense was a complete one, both as to the facts and the law applicable thereto.

As was said in Kelly v. Jones, 290 Ill. 375, at page 378:

"But there was no question of weighing the testimony of the complainant against contradiction, since there was no contradiction whatever of the facts testified to. Where the testimony of a witness is uncontradicted, either by positive testimony or circumstances, and is not inherently improbable, it cannot be rejected. (Larson v. Glos. 235 Ill. 284.) " Morris v. Carroso. 292 Ill. App. 620.

Plaintiff evidently relied solely upon the introduction of the note sued upon as evidence such as would entitle her to a recovery. The presumption of its value as a binding obligation disappeared when the affirmative defenses were established by uncontradicted evidence. Lohr v. Barkmann.Co., 335 Ill. 335;

Nelson v. Stutz. 341 Ill. 387. When these affirmative defenses are neither contradicted nor explained, it becomes the duty of the trial court to direct a verdict for the defendant. Fuller v. DePaul Univ., 293 Ill. App. 261; Wallner v. Chicago Traction Co., 245 Ill. 148.

We think from a review of the evidence, there was no evidence remaining which sustained the allegations of the declaration, as the evidence offered on behalf of the defense completely eliminates plaintiff's right to recovery. That being true, it

These errors which were committed by the triel court in were corrected by the subsequent action of the triel court in vacating the judgment and entering a judgment notwithstending everdict in favor of the defendant.

When evidence was offered by the defense, even with the restriction placed upon it by the rulings of the trial court in refusing to penuit the defendant to explain the circumstances of the transaction, for which we think he qualified as a competent witness, no reply was effered by the plaintiff to sustain her position. The defense was a complete one, both as to the facts and the law applicable thereto.

As was said in Melly v. Jones, 290 Ill. 375, at page 378;

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Plaintiff evidently relied solely upon the introduction of the nete sued upon as evidence such as vould entitle her to a recovery. The presumption of its value as a binding obligation is not when the affirmative defenses were established by under direct relience. Link to these affirmative defenses were neither contradicted nor explained, it becomes the duty of the trial court to direct a verdict for the defendent. Fuller v.

evidence remaining which sustained the allegations of the declaratum, as a sustained the allegations of the declarasliminates plaintiff's right to recovery. That being true, it was the duty of the trial judge to enter a judgment non obstanta.

For the reasons herein given the judgment of the Superior Court is affirmed.

JUNEAUT APPINIED.

HAMBEL AND BURKE, JJ. GCNOUR.

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40941

In He Estate of

HABIRTIET A. MITCHELLY

Decembel,

EDWARD GUEREN.

Flaintiff-Appellant,

V.

HAZIL L. GHILDER,

Defendant-Appellee.

Later March

THOUSE COUNTY.

COOK COUNTY.

305 T.A. 494

MR. PRESIDING JUSTICS DENIS E. MULIVAN delivered the opinion of the court.

deceased, brings this appeal as one of her heirs-at-less and next of kin, from an order entered in the Circuit Court of Gook County on April 19, 1930, admitting to probate an unexacuted cony of a purported will of said Marrist & Sitchell, as and for her last will and testament. This appeal is taken from the same order as was entered in the Probate and Direcuit Courts in the cause entitled, Appellate Court No. 40040, In reflected of Marriet A. Mitchell, Deceased, - Haria Counted.

Anna Bennewitz, Marriet Jalpole and Minute Clancy, Jaintiffa-Appellants, v. Marel M. Griefen, Defendant, Appellant, in which case we have today filed an opinion affirming the order of the Circuit Court, which court affirmed the action taken in the Probate Court.

Inagench as the facts and the law are the same in this case as in Case to. 40040, heretofore referred to, the decision in the instant case will be the same.

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Incomed so the facts and the law are the ame in this this decision in the decision.

Therefore, for the reasons berein given, the julyment and order of the Circuit Court is hereby affirmed.

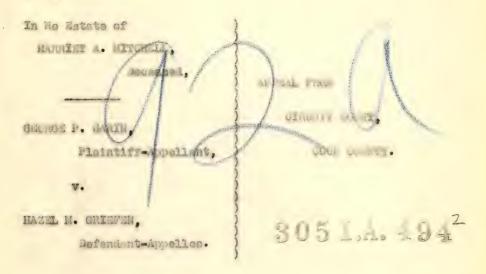
JUXEMENT AND CRUER APPIANCE.

HEBEL AND BURKS, JJ. CONCUR.

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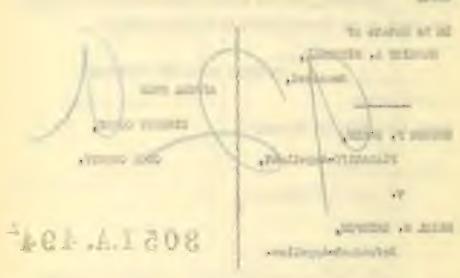


MR. PRESIDING JUSTIC: DENIS E. SHLLTVAN delivered the coinion of the court.

George P. Garin brings this appeal from an order entered in the Probate and Circuit Courts in admitting to probate the will in the Estate of Marriot A. Mitchell, Deceased. An order was entered in the Circuit Court consolidating this cause with two other emuses, viz., Appellate Court Case No. 40040 and 40041, respectively. We have today filed an eminion in cause No. 40040 which is controlling in cause No. 40041. Dut, as no briefs or abstract were filed in this cause, we are dismissing the appeal for failure to comply with the rules of this sourt.

This cause was taken on briefs and abstract to be filed Hovember 24, 1830. Inamuch as no briefs or abstract have been filed on behalf of this appellant and no extension of time having been asked for or granted, because of such violation of the rules of this court said appeal is hereby dississed.

APPEAL DISMISSED.



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CHICAGO STA

EDRAND L. SHITH and REMA OLSOR SWITE,

Plaintiffs - Appellees,

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a. SALAVITCH AND SCR, INT., A corpor tion, and JAMES TOPT, et al.,

perendents - | malling.

of E. W. SMITH, Deceased.

Plaintiff - Appellee,

V.

A. SELAVITOH AND SON, INC., a corporation and JAMES TOPP, et al.,

Defendants - Appellants.

STREET, STORY

SUFARIOR COMMY

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AR. PRESIDING JUSTICE AND E. SULLIVAN DELIVERSD THE OPINION OF THE COURT.

The defendants A. Salavitch and Son, Inc., a corporation, and James Topp, et al., bring this appeal from judgments entered in the Superior Court, this ming a case of treemes on the case for personal injuries, wherein shree judgments were entered and he vardicts of a jury, as follows: One judgment in the our of 4,000 in favor of Livard L. Smith as Administrator of the salate of . . Whith, 1800 in favor of 5dward L. Smith and 1,000 in favor of 1.2 cloon with.

It appears that on August 3, 1936, about 3:30 A. A., at the intersection of York head and Grand avenue, about the mire morth of Limburst, Illinois, an automobile which selected to short. Initious which selected it is father, Edward a. Smith, a man of yours of age, collided with a truck at said intersection; that the squak with which said automobile sollided was driven by the defendant of selection; that said accident resulted in the death of ideard. I with and injuries were sustained by Emma Olson Smith, his sife, and dearl L. Smith, his son.

It further oppears that when the conident occurred it as

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THE CONTRACT OF THE PROPERTY OF STREET AND STREET AND STREET, THE CONTRACT OF THE CONTRACT OF

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The defendants A. Telavitoh and don, Inc., a corneration, and James 1992, et al., bring this operal from judgments unfored in the Superior Court, this being a case of isomers on the orner for personal injuries, wherein three judgments were envired on the verdicts of a jury, as follows: One judgment in the sun of PR.200 in favor of Idavid A. Duith as I think the februs of the Sente of I. A. Duith, 1800 in favor of Edward Chan Class Caith.

It appears the entrait of entrain a level a level at the miles north the intersection of fork level and eroad avenue, about two miles north of Elaintat, Hillands, an automobile shich inlonged to ideard L. Lakin and abich as driven by his fither, Edward W. Laith, a dan 65 years of the collision of the collision

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a clear modaling mint; that the wild limits, with who was killed, had prior to that then been employed for approximately In yours as manager of the stock decortaged of lived Decker Cohen Company; that and identit with we driving mit autocobile in a contherly direction on York and at 40 to 40 siles an hour; that his sife was sitting beside his med we called; that his con Identit, was sitting beside his mother with his are around the back of the ment; that they had spent the reck-end with relatives at Oconomorous, incomein, and, because of the Crowded condition of traffic on Sunday evening, had started from Oconomorous at 11:00 r.M.; that it was approximately 100 miles from Oconomorous to Eleburat; that the inithe how, therefore, been on the road some three and a half hours and had traveled about 104 miles; that the car, a sord Y-5 coups, was two conthe oil and in perfect condition.

It further appears that York Road was a through street protected not only by stop signs but also by marning signs; that the intersection where the socident occurred is not within any city limits; that drand evenue at the place in quantion and a country road, macademized gravel to the cost, and gravel to the cest; that according to Smith it was not a traveled road and at the intersection the view was obstructed at the northeast corner by a cornfield which came, according to actual measurements, within 15 feet of the concrete; that there were no lights of any kind at the intersection.

operating a 17,000 count vehicle 27 to 34 feet long and was proceeding in a westerly direction on brand avenue; that this truck was lark green in color and was covered by a brownish black terpaulin. It is claimed that this truck sudienly came out onto the highway in front of plaintiffs' southbound automobile, blocking off the entire road; that the triver of plaintiffs' automobile applied his brakes and swerved to the right but was unable to prevent the collision;

s class accoming night; the the sold idental. This who were billed, not prior to then been smollyed for expressing it years as senages of the state in the sold ispertment of the sold bear of content; that sold the sold that sold in a southerly direction on fork food at 40 to 45 siles on hour; that his wife and sixtle, had his on idental, age 30, who as herefofore stated, was the comes of the submobile, was mitting as herefofore stated, was the comes of the submobile, was mitting beatas his mother with his orm eround the back of the sent; that they had apent the weel-and with relatives at Oceanorous, laceraing and stated from the weel-and with relatives at Oceanorous, laceraing had stated from Cocanorous at 11:40 F.M.; that it was approximately had stated from the road some three and a laid P.M.; that the initial had, therefore, been on the road some three and a helf hours and had treveled shout werfest condition.

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It further appears that the defendant feats Topo and operating a 17,000 jound vehicle 22 to us feet long and and presenting or and are covered by a brownish block terpolatin. It that this truck sudjenty once out onto the highest in Tolkintiffs' noutiberal automobile, blocking orf the environt the children.

that his left front and the right front of the defendants truck opposite the cab and just behind the right front wheel crashed together and is the splaining for although to injured the he died and his wife and son were injured.

Flaintiffs' case was predicated and pleaded upon a double theory of liability:

First, that the truck of the defendant had failed to stop for the through highery, and

Second, that if a stop was made, the defendant, seted in direct violation of Chapter 30-1/31, Parapraph 36, settler 3, Cahill's Ill. Rev. State. 1953, which provides:

*(3) [* * * motor vehicles entering upon or crossing such highery shall some to a full step as here the state-of-way line of such highery as possible and as relies of denoting shall give the right-of-way to mater vehicles a on such highery. "

It is further claimed that defendants drove said truck immediately in front of plaintiffs' automobile.

Defendants contend that James Topp was a chauffeur for

A. Talavitch and Sons, Inc., on August 3, 1936, and on that Jay driving the defendants' truck honded with produce from Uniong to Rockford, Illinois; that he had with him a boy named for when he was taking to Rockford.

and 14 feet wide and that the combined weight of the truck and its contents as approximately 17,000 pounts; that the truck are 14 feet high and was a new one, about two weeks old; that the truck are green with cream-colored trimmings; that only a small portion of the ranel of the truck should because the entire truck as covered with a black or brown terpeulin; that the driver James Topp had been a truck driver for 31 years and was a licensed chauffeur; that lopp had gone to bed at 3:30 nunday afternoon and got up at 8:30 or 3:00 p.m.; that the truck had not been broken in and was being driven from It to it miles on hour before reaching the scene of the conident; that the

that his left front and the right front of the deleanable track opening the color track object opening the right front about are but the collision for this was so injured that had and son were injured.

Figure 1 and president and president and president and theory of liability:

tiret the true bis the true of the defendant but felled to stap

Second, that if a stup was male, the defeadant, acted in thills ill. "av. State. 1938, abich provides:

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defendants contend that James Tage was a charicup for A. Jahritch and James inc., on Japans in 1900 and and that day contract the defendants track handed with proteon tree drivers to hackford, illinois, that he had with him a key peace for what he was taking to Heckford.

Secondaria further contend that the track one is fost long and is feet us.

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In the same approximately 17,000 pannin; that the truck one 1s feet and one a new one, shout two weeks old; that the truck one green with cream-colored trimmings; that only a samil nortion of the panel of the cream-colored trimmings; that only a samil nortion of the panel of the cream content on the panel of the cream of the content on the form the cream of the content of the form of the cream of the content of the form that the left of the cream of the cream of the cream of the content of the cream of the cream

the treet had a seek broken in and was being driven from 1 to 19

last stop which Topp made was at Harlem and Grand avenues; that said Topp had made this same trip to lockford on this route to or three times a week and was very familiar with the road and that he had crossed York Saad about 200 times.

Defendants further contend that at the place where the accident committed York Road is a ten lane concrete plat, while Urand evenue is wider and made of manadam with an application drawning; that the accident occurred about 2:30 A. H. and the moon was shining bright; that the visibility as such that objects could be seen of ally from a distance of 300 to 400 feet; that the defendant your trove the truck to York Road and, apoving that it was a stop etreet, owner to a stop about I feet went of the stop sign and at that point he could see in either direction for 400 or 500 feet; that he say no cors coming and started to cross the road at a speed of from 2 to 7 wiles an hour: that show the front end of the tmink are 15 to 17 feet west of the west side of York and he heard a crush and felt the smesh of something which had sollider with the side of the grack; that he had not put the car into second gear at the time of the collision; that the force of the impact was so great as to toon his truck to the south and turn it over a plant the telegraph ole at the southwest corner of the intersection; that he heard no horn, no screeching of brakes or other sounds before the sollision.

when testifying the defendant form and that when he not out of the truck, it was lying on its right side, facing sant; that before the collision the truck was on the right side of transference going north. (This evidently is an error as a rank evenue runs east and west.)

the truck he found that it had been struck at the cab on the right side.

wife received injuries consisting of broken banes and lecerations.

lant step mileh Tepp sais mes it derien vas Jones envisor; that self tage had sais this sector in a unitarial tage to be the best of the sector of the secto

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letenians territor coatens that he the place autror the there slide, dels advance and set as a book are Therese stables fine palacest que discuse as dila mateora to atom bac table al omovo relair s w nace and have . N . A CETE deck harreen dealine est vir all make of blood stooted that flow are villetely, and said thighed every news derivately and test (John CC) or CCC to mentait a part turn after one of the si tody palment the but. Arof. of Marris and the false and to her make years but he from that a funde quie a of an - re at the first con 808 me CC was satisfied to the in and blues T as I make to beaut a to book out come of herete has almos erro miles on heart that show the front and of the track was lone if fast and flat has down a broad ad book anof le obje dues add to seem reserved and to this will drive hobiling had notice pullytones to decre our to and and to army income other and out they four had all folds pld cont at as from on arm formal adt he sout add tads paciallies to the sing that but besing you it must be about of all at the the the southwest norman of the interestion; the the heard no horn, as sergeohing of brokes or abler semals cofers the califolists.

Then bestifying the defendant logs sell that when he god out of the truck, it was lying on iss right eits, facing each that before the collision the truck and on the right eits of front areaus going north. (This evidently is an error of front areaus

the received injuries consisting of trainer homes and language the

while their aon austriand a neighbol conqueston, from which they have practically recovered.

when testifying the defendent Topp, driver of the truck,

did not have a very elementary as to his approach them entering the

intersection at York hond mails driving an read aromae. His testimany

also was taken under the statute, crief to the suit, and if varied

materially from the testimony which he have while upon the situate

stand. He testified that 'the frant and of my our men just of fork

road, hitting the macademized - -". Later on in his testimony of

said, in answer to the runstion, "You man it was just over the road",

"Yes; that is, about three-quarters "" I was clean, may remove the

center line already." Then asked, "And your front one remained the

west end of the concrete at the time the collision accurred, or not?"

he answered, "Yes". Then maked if he are the headlight of may auto
mobile couching down the road, he managed, "No, sir. "Ell, count of feet

there is a little slope in the road, and you could not have seen it."

The defendant Topp when testifying as to the cornfield at the corner, in which the crosing sorn apparently obstructed the vier, stated that "you could see over the cornfield." He also stated that, "You could see over it to a certain extent. It wan't necessary, you could see in through the road, and through the edge of it." He further testified that when he appropriate the intersection he stopped three feet west of the stop sign; that he could see in situar direction for 400 or 100 feet; that he saw no care coming and at ried to orpas the road at from 3 to 7 miles an hour.

Topp's testimony was contradictory and indefinite and the jury was well justified in disregarding much of it. It is oute evident that his intent and purpose was to avoid making any statement which would tend to show that he was in any way liable. Ith regard to the testimony of the driver of the truck, when he stated that he looked each may for a distance of MO feet, it has been held that law will not give oredence to testimony that one looked but did not see,

while their and equipmed accountable from within they ϵ

the not have a very clear lies as to his surrough when entering the intersection of York nord while action on trans avenue, his testimony intersection of York nord while actions on trans avenue, his testimony also were taken under the testimony which he give while upon the estimate at the strend. He testified that the front int of up ear was just off York road, histing the matedesized — —. In her on in his testimony he avid, in account to the quastion, "You went it was just ever the road?", we answered, "Yes", when eited if he say the invalidation control, at his testimos he approved if he say the invalidation of any robewhere to a little size in the road; and you say "eil, thout the took of the road; and you could not have seen it."

the defendent fore size in this constant to the constant of the last the view.

"The corner, in which the growing corn size exting obstanted the view of that betted that "his interest that the could see the corn it to a certain extent. It means to recovery, you could see in through the read, and through the ode of it." He

three feet est the step sign; the the scald see in either direction for 400 as 200 feet; that he see me care coming the stated to cross the road of from 7 to 7 miles on hour.

Copp's testimony are contradicty and indefinite out the jory are sail the distribut in distribut much of it. It is cuite jory are not the intent and purpose sen to evold median my state of which regard which read to she to she that he wall tend to she that he was in any vey limits. This regard

give oredence to testimony that one looked but did not nee,

when it is perfectly apparent that if a person had looked he must have seen. Lamage v. Jariorian. Will. And. 11; Jan. 11. 1983. ch. 95a, par. 34; Jones III. Stats. Ann. 85,039.

One to the fact that the occupants of the Ford automobile sustained such severe injuries that the father, Edward W. Smith was killed and his the man on the wealth incommittee, much at the testimony supporting plaintleft a case described upon the testimony of the driver of the truck, James Topp. It is quite evident that had the driver of the truck semiled with the requirements of the intust, the accident would not have occurred.

It has also been held in a similar case that in an action for damages resulting from a solitation of an automobile, which proceeding on State highway No. 41, with defendant's automobile, which, without storping as required by Sabill's St. cn. 350, war. 54 (%), had entered such highway from a side road hidden in a deep out, the liability of the defendent was clear. Anvar v. 51.55, 356 III. App. 555, wherein a wit of certiorari was denied by the supreme court; form v. Sarrar, 564 III. App. 484; Mantonya v. Silvar Lamber Co., 351 III. App. 364.

rights of the plaintiffs in the action of the driver of the defendant's truck in driving into fork Road in front of the onequing utamabile of plaintiffs without having given any nation, or without maying any attention to the approaching automobile which he must have seen. It is our opinion that this was the sole or proximate assume of the accident which resulted in the death of one verson and assigns injuries to the other two persons who were riding in the bord automobile in question.

It is contended by appellant that the verdict is against the confest weight of the evidence. We do not think this is true. There is much contradictory evidence on both sides and we do not think the verdict and judgment should be disturbed.

As was said in the case of Saara, soebnek & Co. v. Leers

elidental to our to our the community of the collection of the out-welling of the entropy of the collection of the collection.

It has also been held in a mindler case in an action for demages requiring from a collision of an evicusoids, which was proposeding an issue highest No. 41, what defendant's automobile, which without eterling so required by Ochill's a. 65. 300, 200, 34 (3), but entered such highest from a cide tool hidden in a deep out, the liability of the defendant was clear. There we have a firm a. 754 Ill. app. 155, wherein a writ of partiered was denied by the suprass caure;

To the plaint the evilones a resilent disregard for the rights of the plaintiffs in the sation of the driver of the defendant's truck of the plaintiffs in the setion of the driving subscaphie of claiminffs although having given any mation, or sithout paying one afterntion to the saymonhing subscabile which he must have seen. It is our opinion that this was the sole or preminete orms of the semi-dent which resulted in the death of one person and serious injuries to the other two persons who sere riding in the death of one person and serious injuries due the other two persons who sere riding in the death of one person and serious injuries on the other two persons who sere riding in the colors.

It is contended by equalish that the verdict is evelue the anifest enight of the evidence. To do not think this in true. There is much controllatery evidence on both eiden end verdict end judgment about to disturbed.

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Slayton Lumber Go., 326 Ill. App. 287, at page 290:

"For, if upon a consideration of the evidence in the record in a case in this court, we should be of the epinion that the evidence was evenly balanced, we could not, under the law, set aside the verdict because it is only where so find the verdict to be mines the mifest of the vilence that we are authorized to disturb it. The purition of argument may does not arise at all in this court."

This case is peculiarly one wherein the verdict of the jury should not be distribed without at we remains therefor. Don't settlemony, as we have admiced, is the kind which should be submitted to a jury where the judgment of twelve son may take into consider than and pass upon the facts presented, the dementer of the witherness while upon the stand and thereby judge as to the predictity of mon witherness.

The trial court is thus better fitted to judge as to sherein lies the greater weight of the evidence than is a court of review.

It is further claimed that plaintiffs were milty of contributory negligence. The Supreme Sourt in the case of Fluor v. lete, 142 III. 373, at page 277, said:

"The suestion of contributory negligence is one which is preeminently a feet for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the selian of a person is clearly and palpably negligent, it is not eithin the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as cell as the other questions in the case."

committed, we are of the opinion that no error was consisted in ruling upon the evidence and the edmission of hospital records, as well as the giving of the instruction complained of. A think a fair trial had and that the court was justified in everyuling the motion for a new trial and entering judgment on the verdict.

for the resons herein given the judgment of the our rior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND SURKE, JJ. CONSUR.

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inis case is peculiarly one reasons the varilee of the jury chould not be distribed without grane reasons therefor. Such testimany, no we have advand, is the tind which abould be unhalted to a pass upon the facts preceded, the descents of the witnesses, the stand and thereby judge no to the credibility of such witnesses. The orthologist is thus better directly judge as to the credibility of such witnesses.

It is further claimed that plaintiffs was guilty of nontrip-

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is to the contention of defenies with regard to extend the conting of the conting of the conting of the content of hospital records, we well so upon the crimenos and the chief of the instruction considered of. To think a fair trial and the content the court sea justified in occurrating the motion for a

for the reasons herein given the judgment of the Superior Court is affirmed.

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MISTE 180 chats, J. Contye.

LAKE VALREY FARM PROMOTE INC.,

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P. U. LANDIN.

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Appelled.

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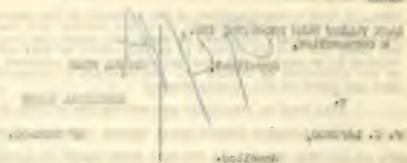
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MR. FEESIBING JUSTICE ACMIS A. SULLIVAN delivered the opinion of the court.

Plaintiff brings this appeal from a judgment ontered in the Equicipal Court for 83.70 in favor of informat. Vising tiff brought suit spainst bringent for the price of cort in dairy products purchased by defendent from laintiff in the sum of 113.71. Defendent filsi an answer similting still ascent was the, and by way of networf and connectating still that plaintiff had breached a contract for the sale of milk between the parties and clausing to have sustained decayer in the amount of 1500.00. The judgment entered in the trial court for 163.70, is the difference between the Max-of decayer 11 years of the 115.70, which plaintiff clairs as the subject to

between the parties whereby plaintiff was to formish with to defendent. Jovewal witnesses testified as to the drapes sustained by defend at and the court entered judgment as stated slove. Those witnesses were permitted to testify that as a result of plaintiff's failure to furnish defendant with its products, defendant lost customers and sustained images of ECC. On. Other witnesses, testifying on behalf of plaintiff, stated that defendant had been asked to sign a written contract with plaintiff, but that defendant



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and American School or a part of the substance of the sub

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had refused to do so, and as a consequence defendant did not receive any milk.

Prop the evidence presented for our consideration, there appears to be a least basic upon block terminet could substantiate his counterclais for local because of design as allowed to have been sustained. No contract is effected in evidence slawing over what period of the plaintiff was to have furnished with to defend at, the price to have few and therefor, or other information on the art of the plaintiff to furnish terminate with said lairy products. Under the discounterclaim and the trial court errol in allowing said counterclaim and the trial court errol in allowing said counterclaim.

Inamuch as defendant has admitted in his answer that he ewes plaintiff [113.81, and there is no local basis for the allowance of his counterclaim for 200.00, the judgment of the fanicipal Court is hereby reversal and judgment is entered here in favor of plaintiff and assinct defendant for 113.21.

HENEL AND BUNKS, JJ. GUNCUR.

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FRANK SWEENEY.

Appellee

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BISHARCK ROTEL SC., corporation, Assistant Marian Marian Mariana Maria

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DIRCUIT COURT

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WR. JUSTICE SURKE DELIVERED THE OPINIOR OF THE COUNT.

This is an appeal from a judgment for \$4,943.80, entered against defendants in the direct Jount of Jount Jounty upon a directed verdict. The judgment represents damages for the conservation of a check dated June 31, 1956, drawn by the Unions Title & Trust Company upon the Sity National Bank and Trust Journay of Uniongs, payable to "Frank i. Beeney", which core the alleged forged endorsement of the payer. Following the alleged forged endorsement of the payer. Following the alleged forged endorsement appears the endorsement of the Disserck Rotel Company reading Tray to the order of the first Sational Lank". At the close of claimtiff's case, counsel for defendants announced that they did not intend to offer any testimony.

ment involving the real estate at 4010 Inving Fark -onleverd, Chicago, was made. The Chicago Title & Trust Company was maded as the escrewee. The agreement, provided that the funds be disbursed under the direction of the Bills --nagement and Mortgage Corporation. Tub-sequently, the bills corporation instructed the escrewee in writing to "pay to Frank J. Juscensy" \$4,342.80. Accordingly, on June 78, 1936, the Chicago Title & Trust Company drew a check on the City Sational Sank & Trust Company payable to "Frank D. Sweensy" for the amount indicated. D. I. Dunn was then vice president of the Bills corporation.

b. 4. Gwens, a vice president and escrew officer of the

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ageines detendants in the Sirouit Sant's of Sant's Sant's venus and the description of a shoot detendence for the serversion of a shoot detend on the Si, 1234, drown by the Chicago Sitle a Trust Sampany upon the Sity Retional Deak end Stuck Sant oy of Silongo, payable to "Imak i, Greeney", which here the alleged Santones and grammed the short of the payer. Sallowing the alleged Santones and the the short of the Dismarch Motel Sammy reading the the short of the size Mathematical Santones of Silongol Santones of Silongol Santones.

The recent discloses that on My 2, 1888, an estrow agreement involving the real setate at 4212 lyving Fork "collevard, Chicago," was made. The dislonger The dislonger The dislonger that the funds be disloursed under the fine atlia sanegement and Martgare Corporation. Subsequently, the mills sanegement and Martgare Corporation. Subsequently, the mills saregeration instructed the economic in writing to "pay to Frank & Amenney" (4,362,80). Scappingly, on June 38, 1988, the Unicago Title & Trust Company drew a carek on the City Sational Heak & Trust Company payable to "Frank S. Saccasy" for the amount indicated. A. T. Duna was then vice president of the city securors that

H. I. Owens, a vice provident and searcy officer of the

Chierro Title & Trust Josephny, testified that at the time the check was issued he was accommisted with the plaintiff and that he then understood that the Frank I. Issuency named as cayee was the same person who is the plaintiff berein. He further testified that he delivered the check to Junn, who was connected with the Dilla corporation at that time, and that claintiff was not present at the time the check was delivered.

Plaintiff tostified that he was en each the real entate tex business;" that he undertakes for trust companies, banks and low firms and others to "mutline the back has taxes owing on any particular piece of real estate and make our recommendation as to how s vings can be effected legally so the sitls a frust domany will issue a jurianty title saling the property archent ble a in after having been cluttered up for any years;" that he was the sole owner of the business; that he employed from 10 to 17 amployees; that one T. J. O'Mara was employed by him from Reptember, 1936, until the latter part of June, 1976; that O'Mara received as commencation 30 af the net fees procured through his (O'Mara's) solicitation; that he enjoyed business relations with Dunn and the wills corpor tion; that in connection with the property at 4018 Irving Fork -oulevard. "we were called in by mills analty;" that Duan telephoned C'Mara the latter part of ipril or the sarly part of May, 1936, with respect to a tax search on the Irving Perk Poulsvard property; that 300 or 400 proposals went out of his office each wenth, consisting of a tex search and a letter of recommend tion as to how savings could be effected; that he did not learn that the check had been issued until the latter part of april or early in May, 1037; that he then examined the check and saused a notice to be served that his endorsement thereto was forged; that the endorsement on the check and that of T. J. Plants: that he did not outhorize the latter to endorse the check and did not know that o'Mara was receiving it. On cross-examination, he testified that in soliciting the bills corporation, O'Mara was

Objects Vitle & Trust Joniuny, testified that at the time the check one increase and increase and increase and that he then understood that the track of the present and that the present and that the plaintiff herein. He further testified that he delivered the check to hum, who was connected with the wills correct tion at the time the tion so that time, and that plaintiff was not present at the time the check was delivered.

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Plaintiff teetified that he are engined in the area, tes pined , spinesses fourt for tendering ad deds "spending and and street and attent and that the sailt of the said and are on the court wal and of an animonary trop sains has sector for to cook relationery savines can be effected legally as the little & fruct consents will their sing ticinemes tream not being still memory a wait reams size out the of feit "jurney your for ou betativing most maken es the business; the same of the state and the business the to ". J. C'Mara one uncloyed or him from lentraber, latt, until the to 100 moiscanecase as heviscar sare of that 1881 . and to tran restal ad the medicinales (stemmin) als dynamic berreare seet on ods this total more silk out has now with another esemble beyond in consection with the property of 4018 living lark Coulevers, one were called in by Mila calify; that Juan telephoned Collars the labour part of teril or the early part of day, little milk respect to a och as Cot that traing Park "waley or operty; that 300 as done as proposale sent out of his effice each south, consists of a ter ed bluce excive and or an noitrinumpoor to rettel a has goras Those bewel need bed weeds and and areal for blb of ends, thereshe banismes sout of that I will age in Mary in that he troy wastel add organis tananacolus aid tade haven no or soltan a bonuso has seedo nat serial that the codoresest in the check was that of T. J. o'sseri All has done will employ of three add together need to be like as look not know that O'More we receiving it. On erese-wranin ties, he testified that is soliciting the Mills comparation, O'Mere one ecting as his (plaintiff's) agent, and that the Jills corporation hired his firm, acting through him (O'Mara).

Counsel for defendants stated to the court and jury that O'Hara, who had had the check, and a friend of the Jeantroller of the Jiamerck lotel Commany; that Albara handed the enack to the Comptroller, who handed it to his assistant; that the latter sent to the bank and had the check hearted; that the money was obtained from the bank and brought over to the Pienerck Hotel Journay and paid to O'Mara; that the reason the hotel company "happened to cash" the check was that the Comptroller knes O' Mara; that he (the Comptroller) did not notice the name of the payer on the check; that he (the Comptroller) did not require O'sars to enteres the check and did not question it in any say; that when the Comptroller mave the check to his assistant, he thought the latter sould require the endorsement of the person who was to get the money; that the assistant was under the misapprehension that the Comptroiler knew that O'llara was Sweeney;" that as a consequence the check was crahed; that the check which was made out to becomey was, in reality, intended for O'Mara; that O'Mara was hired to do the work; that, in reality, O'Mara and not the plaintiff was the payer of the check, and the person intended to receive the money, and that O'lore, and nobody else, was hired to do the work for which the money was given.

The first criticism leveled at the judgment is that the court should have granted defendants' motion for a directed verdict because of the failure of the plaintiff to prove his title to the check. The record shows that plaintiff, through the solicitation of his agent C'Mara, was employed to render certain services in connection with the texas on the Irving fark Bouleverd property; that an escrew agreement was made; that pursuant to that agreement the escrewer was directed to pay to plaintiff the amount of the check in controversy; that the check was drawn and delivered to an officer of the sills corporation; that shortly thereafter the check was

economic altra through the (Calore).

Council for defendants of the the cours and jury that To relieve the bad the cheek, a a tricul of the bageteric and at Moode and behand ared to said symmet Latel Mornings and despirator, who bended it to his resistant; this the latter west Comincia new yours and deals placement found and had had deed oil of in purposed Latel decomply and at your friends the dead and and buses of becomed queunes level and mesons and fout jures to a bles eds) of this intel to want tellertrans out that you dough out test plante and no even and to own out welcom the (vallous and has deeds and tarolus at arch! I saluper and bit (salirations) as did not question it in any way; that when the damptooller were the and animper bluom untial and daycooks an stantalana ain at Hoads endersone at the person who we are the accept that the persons one to that when this section that had been been been been presented and sas impaney;" that as a consequence the check was coched; then the chook which was made out to hearney wear in reality, intended for Discount that O' have one hired to do the work; that, in wallity, O' Mare SERVING OUT THE ATTERT AND THE SPENCE SELL AND YESTERING AND BOX DEE intended to receive the mency, and that altere, and nobedy else, was marks are years and delay not some at the bests

The first oriticies leveled at the judgment is that the court should have greated defendants' mution for a directed verdict because of the fribure of the claintiff to prove his title to the feather of the claintiff to prove his title to the of his agent of the consection with the tames on the laving fund Seminary property; that an endow agreement was made; that pursuant to the agreement the court of the court of the obeck the correct of the obeck the correct of the obeck the correct of the check of the obeck of the obeck of the check of the obeck of the check of the check of the obeck of

Company; that o'Mara endorsed the name of claiming to the check, and that o'Mara had no authority so to do. We are of the opinion that the proof establishes that plaintiff are the cape of the execk, and that the wills corporation, which controlled the entrol directions, intended plaintiff to be the payer.

The accord point advanced by the defendants is that the court should have arented their motion for a directed vertiet because of the failure of the plaintiff to prove that the chark and delivered. The escraved delivered the check to ar. Cunn, an office t ar the bills corpor tion. It that time of ware was in the supley of al intiff. The evidence shows that the check was aprivered to offer by a. Junn. is O'Mare was then the agent of the praintiff, derivery to him are delivery to plaintiff. surtherapre, olvintiff testified that in spril or day. 1937, the canceled check was exhibited to him in the office of Fred Cardner, secretary and treasurer of the Gille oprogration. It does not women that the wills corporation, which directed the issuance of the check, reised any question as to the delivery thereof. It will also be observed that in the at tement which counsel for defendants made to the court and jury, he declared that his assition was that in reality o' wars and not Incomey was hired to do the work. It is older that the position of counsel for defendents, during the trial, as that the check was delivered to O'Mera, who havin been hired and having done the work, had the right to endorse the same, and that in reality (Wars and not Sweeney as the payer.

The third point arged by defendants is that the court erred in instructing a verdict for the plaintiff. That point has been fully answered in our discussion of the first two points.

Finally, defendants maintain that the court erred in admitting the check as an exhibit. Our discussion of the previous points makes it obvious that the court properly admitted the check.

For the reasons stated, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

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doubley; that O'vers endapsed the ness of licinists to the careta
and that the proof establishes that glaintist was the cape of the carety
and that the proof establishes that glaintist was the cape of the carety
and that the Pilla corporation, which dontrolled the essence tirestions,
intended winintist to so the espec.

free account fold above as the description in the charge par he newrood talbrey between a ref selfem vient between eved bloods the fillure of the elaintiff to prove this the disch was delivered. The searched delivered the check to Mr. Jana, on of first of the Bills At thet time to More out in the employ of sleintiff. serror-tlen. The evidence shows that the chuck was delivered to there by ir. Lamm. tar d'ulera was then the syent of the claishiff, delivery to him was Surthermore, wheintilf westified that in delivery to plaintiff. all al sin es levidiose and conde halendes and . VEEL . vel to Live neitroone milia ed to measure the entrees and total to soith t does not seemed that the bills corner then which directed the of the check, raised any cuestion on to the delivery thereof. got langua daide transf se ads at test bevreade ad eals iliv s efendants made to the court and jury to dealess that of other and vos tant in venilty O'sers and not beenny was hired to do the work, is ober that the malfirm of secasti for defectable, hering the mind privat ads , need to ap immediate one Know and field are , Labor where this respires at biggs only had allow not man natively has been and thet in reality clears and not Sweepey of the orgon.

The third coint orged by defendants is that the count care in interesting a verdict for the claiming. That paint has been fully encurred in our discussion of the first two points.

Our discussion of the previous points sakes the the check.

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ROSE HATZEMBUEILER,

Appelies, GOUNTY COURT COOK COUNTY

NISKE, LOVISE MICKE, HIMA

Appellants.

305 I.A. 496

MA. JUNTION BUNKS BELLIVERED THE OFFICER OF THE COURT.

On June 18, 1959, the County Court of Good County allowed plaintiff's motion to dismiss the appeal of the defendants from a judgment of a justice of the peace, and on July 1, 1979, denied defendants' motion to vacate the order of dississal. This appeal seeks to review the action of the County Court is dismissing the appeal and in declining the vacate the dismissal order. The transcript of the justice of the peace shows that on April 22, 1939, plaintiff filed her complaint in forcible detainer and named Alfred Viske, buth J. Wiske and Mines Wiske as unlawfully withholding from her the possession of the premises therein named; that he issued a summone which was served on Alfred Mishe, Buth B. Wiske and Winna Wiske; that the defendants asked for and were granted a change of venue; that the case was tried on May 18, 1939, and resulted in a judgment that the plaintiff was antitled to the possession of the premises from "Alfred w. Miske, Buth B. Miske, Minna Wiske and Louise Miske;" that on May 16, 1959, he (the justice of the peace) declared the judgment, in so far as it affected Louise Miske, to be null and void, because she was not a party defendant and had not been served with summons. The transcript further recites that on May 17, 1940, "defendants all prayed an appeal to the County Court of Gook County, which was allowed upon the filing of a bond, which also included Louise Hiske, in the sum of 100, and the payment of sppeal fees." On May 17, 1919, an appeal to the County Court of Gook County was taken and approved before the justice of the peace. The bond recites that Isabelle Micke, Alfred

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NAMES OF TAXABLE PARTY.

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305 I.A. 496

A MARCH TO A LINE WILLIAM WINTER AND A PROPERTY AND the June 10, 1870, the transmit transmit thrown throwny albumen tiestall a sold as a clambal the court of the state and a follow a street at a terrice of the sence, and on July 1, help, " mich act minuse" saction nation and weiver is seen that a rate . Investment to carry all edonor at efform all initialization at an form of the contract of the bottom of addingtoned order. The transcented of the Jackies of the petus plants or an aurit is, its notice files is one is in Samelila day service at craid entity on stilly at draft, but he bear the unclasthere wiers from the currented to the contract with a the contract the contract to the contrac on a large de a come en contrata que en comita de la large de la l a definit ; sinvitual for house attacher lab and that to Hall manda Lander; thet the oses were teled on to 12, 1200, and woulded toomer to and to melocauseou and all relations are Tilbulate and main framelia all the from Pallynd . Manne, buth . Hair, diam Plane on Louis for an May It, 1989, he (''es justiles of ties paper) Leciared the function of at at farth and a wall of the sale for the sale Nov. became the wes not a party definition and had an been sarrow with THE THORSELLY SUPERING SHALL SEE NO. 17, 1911, "Authorwith the grayed to to the County Court of Lara County, which with the dies thing of a bend, which shee indicated Lealer tisks, in the west of the tall the proposit of record from, on may by Lint, on e added developed that deded early graphs decided pareved better here's . The lades land to the to be a lade . The lades

Miske, Buth D. Misks and Minne Wisks are bound unto the plaintiff in the penal sum of 1100, and that the condition of the obligation is such that whereas, the plaintiff recovered a judgment against Alfred Wiske, Buth B. Nicke and Ninna Misks for the restitution of the described premises, and costs of suit, from which judgment Alfred Micke, Jush B. Miske and Minna Miske have taken an appeal; that "now if the said Alfred Miske, Buth S. Miske and Minns Wisks shall prosecute their appeal with effect, and also [pay] all damages and loss which the said plaintiff may sustain * 4 * in case the judgment from which the appeal is taken is affirmed or appeal is dismissed, than the above obligation to be void; otherwise to remain in full force and effect. The bond is signed only by Isabelle Miske, the surety, and by Muth M. Miske, one of the defendants. On May 31, 1939, plaintiff filed her special and limited appearance in the County Court for the purpose of "contesting the jurisdiction of the court." At the same time she filed a written motion which prayed that the appeal be dismissed. On the same day the defendants presented an oral counter motion, asking that a rule be entered on the justice of the peace to file an amended transcript, which motion was allowed. The motion of plaintiff to dismiss the appeal was continued, and on June 12, 1939, the County Court sustained plaintiff's motion and dismissed the appeal of Alfred Miske, Buth B. Hiske and Minne Wiske. On June 27, 1939, the defendants and Louise Miske filed a written motion, preying that the court vacate the order disminsing the appeal. The motion was presented by attorneys Schachner and Bisgan. The metion was accompanied by a petition, verified by one of defendants' attorneys. On July 1, 1930, the court denied the motion and petition to vacate the dismissal order. On July 20, 1939, attorneys Schaehner and Siegen withdrew their appearance os attorneys for the defendants and Louise Miske, and attorney Lawrence Lenit entered his appearance in their stead. At the same time, they algned and filed a consent to the substitution of attorneys, which reads:

[&]quot;se hereby consent to the withdrawal of Schachner and Siegan, our former

12 seles, suth it, highe and blunc sloke are bound unso the pleintiff in dance of molocyless sait to worklines and that the , till to one imper a the parent of the content transfer of the parent of the pa nuth A. Wishe and Minne Wishe for the recibination of the described premtees, on costs of suit, from which judgment alfred wishe, buth M. Miche boulfs have take now there; they energy the sold allered ere thin I. Hiele and Minne Miche whell processe Weir report with effect, and alse frant all demanes and less which the said plaintiff may at reast of Langua will dolde post throughet and ware at a s a side thiev of ad meligatific events all contacts and factor or Beautita vise bearing at head adv ". Post's and store at alegan of salves "I leabello dishe, the averty, and by inve it. igain, one of the defoul-- The May 21, 1988, piristiff filed her special and lastes appearance culturing the past national be senting and yet from groom and of another degree draft mightin unitypy a dealth ann anir anny aft da ", reput for he to research administrate with the case out of the interior of fewer and rule To asitud and no have yet a sult a sultan as the ma during the title and the sultan in and the an excelled transporte, which nether was allowed. The delicated to dischar the organizate actioned, and on June 18, NEWS, the County Names supristant pinistiff's settem and themistant the agreed of Aldred Water, Party J., State and State Strike. On Jose 50, 1809. the defendance and Louise while a tout the course, program that the becoming now making bull . Lastic and unbacked bader and abaset Supple a seems Schreiner and Menas. The motion was successful by a 80 Parky Smillerth off educer at mighting has suffer off defaut France Poly 35, 1975, afterdays telephone and Clayer withdraw Maily separated on the defendance and Louise Nicke, and afformers inversage Land energy to their stead, At the epoc time, they indeed deliv , where to gold historian of the control in Land.

married the place it had contacted by Deverbille will all Passess uppend up-

attorneys, and consent to the filing of the appearance of Lawrence Lenit, as out future attorney in the above entitled cause."

The first point we will consider is the contention that plaintiff should have served defendants with motion of the motion to dismiss the appeal. The record establishes that attorneys chackner and Siegan appeared for the defendants and argued against the notion to dismiss. They also presented and argued the notion to weste the order dississing the appeal. Apparently, defendants' position is that the notice should have been served on them personally. The substitution of attorneys and the consent thereto shows clearly that Schachner and Siegan had authority to represent the defendants. As defendants were represented by attorneys of their own choosing, they cannot new successfully complain that they were not served with personal notice. Another point urged is that the justice of the peace had no power to change the judgment order by declaring the judgment against Louise Riske to be void because she was not a party, nor served with summons. The record does not show that this point was reised before the justice of the peace or in the County Court, and it cannot be raised for the first time in this court. Louise Highe was not a party, nor was she served with summons before the justice of the peace. The appeal bond filed with the Justice recognizes that she was not a party dafendant. We do not understand how she can appeal when she is not a party and when there is no judgment against which she can complain.

The point on which defendents place chief reliance is that section 180, chapter 79, Ill. Nev. Stat. 1839, provides that "no appeal from a justice of the peace chall be dismissed for any informality in the appeal bond, but it shall be the duty of the court before whom the appeal may be pending, to allow the party to smend the same within a reasonable time, so that a trial may be had on the merits of the case." An appeal from a justice of the peace must be prayed, and it is essential that the parties appealing file an adequate appeal bond. The defendants contend that under Section 180 it was the duty of the court to enter a rule on the defendants to smend the bond within a reasonable time. They argue

Property and consent to the filling of the up correse of lemmanus Landy.

-ulain suit and inclinations but is a substantial to the author suit and calmil so soften ent to selfus site tim noteb bevose eval bisnic this the appeal. The record or tellishes that attenders in the main or the conencorped for the defenients and arguet against the metica to declar. Tary else presented one expand the notion to whethe the order displacing the mend. Apparently, derentante partition is that the solice minist have been served on them percentling. The subcritichism of attractor and the cased thereto shows clearly that whatmer as hispan had multiserily to to enough the defendants, he defendable were recreased the atternance as the bow changing, they cannot now exceedingly comiledu chan the blue wave authorit pill person the property and in the class to the beauth have been the gates and not support to strong the parisons or but well and the or a mained Locine Histor to be veld because the was not a marty, nor desire som parag alor from when deen and deep many will enter me alor bestelle of the passe or the Courty fourty and it among the TOTAL A THE ART ADMIT VALUE OF THE ALTER AS AND THE PART OF THE PARTY. bor was the served with surecase being during at the perce. The superl bond filled with the Juetian vecugains that she was not a party da-We do not understand how one one spand than the in act a porty the sea to se judgment egainst which the con continte.

tion 100, chapter 70, 111. Nev. that, 1820, provided that the appeal from a justice of the peace chall be disclosed for any informality in the appeal to and, but it chail be the dety of the court before that the opposit the analytic opposit the sense within a re-assable from a justice of the peace must be prayed, and it is essential that the line file an adequate arread bend. The telephones connect that the enter a rule on a the fourt to enter a rule on a seasonable time. They are or and

that the bond which was filed was in substantial compliance with the statute, and that the court had jurisdiction of the appeal by virtue of the fact that the bond was signed by the surety and by buth b. miske, one of the defendance. Appeals in forcible entry and detainer are governed by statute. The appeal must be perfected "in the same wanter and tried in the same way as appeals are taken and tried in other cases." (Sections 19 and 80, chapter 57, ill. Rev. Jat. 1939.) The bond must provide that the defendant "will prosporte such appeal with effect, and pay all rent then due or that may become due before the final daternination of the suit, and also all damages and loss which the plaintiff may sustain by reason of the withholding of the premises in controversy, and by reason of any injury done thereto during such withholding, until the restitution of the possession thereto to plaintiff." The appeal was prayed by all of the defendants and the bond recites that all of the defendants are bound thereby. As stated, only one of the defendants signed the bond. Alfred Nicke and Minne Miske did not sign the bond, and, therefore, did not effect or prosecute an appeal as provided by Jection 30 of Chapter 57, (soreible Latry and Detainer Act) Ill. Nov. stat. 1939. The defendant declares that the appeal was not a joint appeal. We have carefully examined the reported cases and are convinced that it is not accessary that the parties appealing shall specifically state that the appeal is a joint appeal. If they all pray the appeal, it is a joint appeal. The reported wases also convince us that the defect in the bond is not a mere informality. One of the essentials in an appeal from a justice of the peace is that there be an appeal bond. Numerous cases hold that where a joint appeal is prayed and allowed, all appellants must sign the appeal bond, or the appeal on motion will be dismissed. Congregational Church of Harvard v. Page, 255 Ill. 267; Milaman v. Beale, 115 Ill. 385; Tedrick v. Wells, 152 Ill. 214; Town v. Howisson, 175 Ill. 85; Fortune v. Gilbert, 207 Ill. 238; Stiefel v. Amalgamated Theet Metal Workers Local Union; 198 Ill. App. 94; National Bank of Connerce v. Church, 195 Ill. A pp. 310.

(APT 200 B - 100 B - 1

provide for the payment of rent due or to become due was such a defect as could be amended.

party to an appeal band, the court may, if it deman necessary, issue summons requiring the appearance of such defendant, and thereby obtain jurisdiction of him. They rely an Section isl of Chapter 70, Ill. Nev. stat. 1959, which reeds: "when an appeal shall be taken by one of several parties from the judgment of a justice of the peace, the clock of the court shall issue a summone against the other parties, notifying them of the appeal in the said court, and requiring them to appear and abide by and perform the judgment of the court in the premises. """ This action is not applicable to the facts in the case at bar. It has reference to a situation where less than all of the defendants pray an appeal. In the instant case all of the defendants prayed an appeal. They also appeared in the County Court and urged that court to permit them to smeat the appeal bond.

For the reasons stated, we are of the opinion that the County Court of Cook County was right in dismissing the appeal. Hence, the orders of the County Court of June 12, 1939, and July 1, 1939, are affirmed.

ORDERS AFFIRMED.

HEBEL, J. and DENIS S. SULLIVAN, P.J., CONGUR. Plaintiff also calls atvention to the fallure of the land to provide for the payment of rent due or to become due. Secune if ove views on other points, it is unnecessary to decide whether the fallure to provide for the payment of rent due or to become due not not a cefect to

Defendante further maintain than where any defended is not usual party to an apposit bond, the court may, if it deam necessary, links amminicative requiring the appositions of such defendant, and thereby obtain of him. They rely on hostion lill of theater TV, Ill. Her.

pertion from the judgment of a justice of the peace, the clock of the court chail leave a summan spained the other pertion, notifying them of the apposit in the cold court, and requiring them to appeal in the cold court in the peace and shire by and perform the judgment of the sourt in the premines. It is not notion in not applicable to the fact in the premines. It has reference to a final applicable to the fact in the permit that the reference to the first cold of the defendants prox as appeal. In the dentition them to ment the man to ment the

For the reasons stated, we are of the equals that the daming dourt of deed dounty was right in dismissing the appeal. Seace, the test the dounty dounty dount of June 18, 1858, and July 1, 1868, are of the ed.

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CHICAGO TITLE AND TRUST COMPANY, a corporation, as Frustes,

malle f.

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THOMAS D. RANDALL, EDITH A. MANDALL, et al.,

Defendants.

LOUIS SUSMAN,

Appellant,

GOOK COUNTY.

305 I.A. 497

ILLUOUIT COURT

V.

enroade fittle and Thust Company, a corporation, as Trustee, et al.,

Appellees.

On May 3, 1927. Thomas D. Randall and Edith A. Mandall, his wife, executed and delivered their 346 coupon bonds, numbered from 1 to 346 inclusive, for the appropriate principal was of and and and and The bonds were in denominations of 500.00 and 1,000.00. sont mumbered 1 to 8 matured may 3, 1939, and the balance matured successively thereafter on May 3rd and hovember 3rd until May 1, 1937. They bore interest at the rate of 6-1/3, per annua, payable semi-annually on the 3rd day of Sovember and may of each year, evidenced by interest coupons attached thereto. To secure caysent of the bonds, the Mandalle, on the same day, executed and delivered their trust deed to the Oniongo Fitle and Frust Commany, as trustee, covering the real estate and improvements known as the toyne Menor Apartments, located at 6936-30 Tayne vanue, Chicago. This look was for the armose of constructing the milding. In selling the bonis to the mblie, it was represented that the building would contain 60 apartments one letely furnished." It the time the bonds were sold the building was appraised at 305,000.00, and the land at 30,000.00, a total security

of 385,000.00. The trust deed provided that the borrower must deposit

each month 1/6 of the semi-annual principal and interest throughout the term of the loan. The original underwriter of the bond issue

MR. JUSTICE BURKE DELIVERED THE COINION OF THE COURT.

ONICASE SIFE AND E.C. F CORPANY, n

Appeal to the cut of the cut o

em. sweetss words white a transfer of the court,

on may C. 1987, Thomas J. baskell and tith A. Maniall, his

wife, executed and delivered their 346 doupen bands, numbered from 1 to 346 inclusive, for the appropriate principal and of (200,000.00. the bonds when in demondantions of 200.00 and 11,000.00. manufact the transport and the party and the believes to be because on by thereafter us may fast and themselve flet until day in little interest at the rate of M-1/24 per enums procie semi-sumually on the and day of beyonder and day of each year, evidenced by interest soupons stroiged therefor To secure repent of the basic, the head sever rings berevilet has belower a top once our as inlined to the Chicago Title and Truck Corporay, se tructes, covering the real esters and improvements known as the topus demon apartments, include In secretar bully but are like the thin the the the parties at to beilding. In selling the bound to the roblin, it isoslingo administra Ob alabam Lluce quiblism out tent becausere and now pathline and him once make only only out it ". bedelaugh the contract of the contract o of fills of the property all full parameter and for the parameter and through tenspoored turnsent has Inchesing Immun-laws our to old aroun sure mental land one has represented the party and amount to write any

wer intakt a domning. The principal and interest my onto ser to be made at the office of the latter company. Various defaults were made in the payment of principal, interest on terms. I boundhalmers! consitted was are mired, which calls about the bondholders to deposit their bonds. On day 18, 1334, the truster filed its commising to force close the trust need in the dirouit lourt of wook Jounty. The armed was referred to a Master in Chancury, who reported his finding and recommendations. On sebruary 71, 1976, a decrea of foreclosure and sale was entered. Attached thereto mis a cony of the original deposit agreement dated rebrusry 1, 1930, as assented a ril 4, 1930. This deposit a resuent purported to be "for the protection of the bandholders or first mortgage bonds sold through Leight i Com-ny". The presable of the deposit agreement recited that it was the intention to take action to protect the various defaulted issues underwritten by Leight & Company. Wotion I of "rticle i, thereof named the Shicago Title and Trust Commany as depositery, and action 2 of the sime article provides that upon the determination of the equittor, bonds of any given insue were to be salled for deposit. A holder of any such bonds could deposit the same with the depository and receive a certificate of deposit. Also attached to the statement of intention to bid, was a plan of reorganization. On May 10, 1935, the Master filed his report showing that he sold the president to "limbeth Henderson, a nominee of the committee, for the sum of 40,000.000. The Chancellor directed the committee to give notice by malication of the date set for the hearing of the motion to affirm the sale and the plan. On June 7, 1938, Louis Susmn filed objections. On July 16. 1938, the court referred the petition for affirmation of the sale and for the approval of the plan, and the objections thereto, to a special commissioner. Duamen whoo filed objections to the account of Marriet Hemning, who had operated the property. As also filed a petition in the nature of a cross complaint. The court also referred the objections to the account of Harrist Henning to the special commissioner and elec-

we had be dampeny. The unioning and account a said account be wide at the effice of the letter sem may. "-rious refults says ands in the payment of principal, interest and terms. I beninelders! tivened of arealendard and many balled deline besize no are settlement their bunds. On day 15, 1834, the tructes filed its completes to lerou close the trust dred in the Circuit Court of Fool Foundy. The deves our reformed to a thretor in Chancery, who reported his flickings and recommendations. On February II, LERS, a decree of foresternive and discret lacked als to you a per obstate beloads. .horden any also eige of the stand follows as asset of 1970. The country of the cou -incl od to acitosopre set ret" as as belrourne dans sere diaccel a lord a right a property than along a property a decire. nationated with the descent proposers without to aldersay off assistant a project the trained definited as makes with as by leight & domeny. Meating is the latter to a second a signal by off to I notice but the depend of the case of the case of softiance said to appreciate the department of the province, lo rebled t. . timpet not believed of over seest nevily que le shoot rejected has presidently before the case with the court of the court o a centificate of deposit, then attached to the statement of intention carpail and agree of the sail on the california beautiful to make a new plant of disciplify of conjugg out hise an tent galanda from an hall? Manderson, sa nominee of the seamittee, for the sum of 140,000.00. The Chancellar directed the equalities to give motion by public tion of has also odd mallin of the mering of the mains of the eliter to the all that his a continuous ball's frame about 1004 of many my make not lais, the court referred the polition for efficuetion of the role and for the approval of the plan, and the objections thresho, to a special delived to due now all of oncidention belth only noment of during density, and had opened the property de sime filed a positive in the meture of a deem complaint. The court also referred the objections and the remainstance deletes wit all partial deduced to flowers toff of

directed the special commissioners/report to the ther wash by granted lange to file the "patition in the nature of a pross-complaint". Sussen was not an original surchmer of the bonds but purshased the east after the entry of the deeres of foreciouse at prices ranging from 10 to 3 cents on the dollar. The special somissioner reported to the court. On the basis of the resort the Chancelior entered an order on June 30, 1839, (1) senfirming the Mr. (1) directing certain shanges in the plan of reorganization and approving the plan as ag naceded, (3) approving the report and account, and (4) appring leave of Justin to file the petition in the nature of a cross compliant. Justin filed applie tion for an allowance of free to bis attorneys. which applies tion, to other with the appliestion for fees filed by other counsel, was referred to the apecial constrainer. The apecial cousis ioner in a supplemental report recommended the allowness of fees to busmen's equasel. Then the report and on for hearing before the Chanceller, he disalised say fees to Justin's atterneys. Income prosecutes this appeal from the decree confirming the sale and approving the plan of reorganization, from the refusal to allow his catition for affirmative relief, from the order approving the account, and from the order allowing fore to various parties and r fueing to allow fees to his counsel.

The first exiticism presented is that the decree, which placed certain defaulted bonds on a parity, was procured by fraud, and that it was the duty of the court to modify such decree. The bonds and coupons maturing up to and including way 3, 1809, numbers I to 5, in the apprent principal sum of 3,000.00, were said and canceled. The mortgagers failed to deposit funds for the payment of coupons leries 4 and bonds numbered 6 to 10, in the apprents principal sum of 3,000.00, payable movember 3, 1929. Leight & Company took up the matured bonds and coupons of this date from the bondholders thereof, and by notice served on the trustee dated Jamuary 37, 1320, purported to assert the right of Leight & Company under the trust deed, to hold

ed names' rediction of a strongly pendicular on I-long edit haterally and leave to the file the destrict is the notice of a core-conduct. and has choose for somed our to recoderar leady to no dea our account summ after the entry of the decree of forcolamits is extens tracing from 19 to de conto on the caller. the successive tensioned ne harries well-counties and tracers and to alead and and adverse and of erter on June 70, 1303, (1) confirming the cole, (1) directing certain changed in the plan of reargnifation and as reving the plan as co print palymen (a) car thusers has stones and palverges (5) believes to discount to file the published in the news of a cross coupling. bosom filed application for an allermor of fees to big attorneys, ship a line tion, to conser with the spoiler than in fore filed by other occurat, are referred to the aprelat occupantation. The special to one olle the helphanopat taget Legatation at the election of toes no because a common that the sever sever of the beauty the Chancellar, be distilled any foca to Cuarma's attorneys. Turing polycy: To his olse ode polatican person add mort leage will resuperage ret modifies ald modifies I could not not motive increase to make out add dood has , dayoo ee e y dady gady access a constant of each welle at palenter has colling a lia connect.

The first officient process, and the plants of the process, and plants of certain defected bands of a mathy and desire. The bands and that it are the fury of the court to makiny and desire. The bands and coupons acturing up to the mainty of an anabers I to S. in the appropriate principal cum of "3,000.00, were paid and conceled. In the appropriate of coupons The markengors folled to descent for the expresses of coupons Torica & and bands municated to to 10, in the expresses eximpted one of 13,000.00, payable horomore is lawn, leight & descent to concept the the expresses eximpted one of 13,000.00, payable horomore is lawn. Leight & descent to the express.

such bonds and coupons so purchased by it on a parity with the unmatured boads and soupons. It filed, to ever, to live such notice to the bandhalders. The trust deed provides that in the event is int . Commany sivenced any of its funds on principal or interest, then on failure to notify the trustee and the bonibolders, the bonds or coupons so acquired should be transed as subrounted. In lovester or less above, 1983. certain bondholders and representatives of light . Manuary held meetings to determine what wotion should be to see in with at "De default in meeting the November 2, 1973, principal and interest a torities. Homer . Tingern, a Chicago ttorney, attended the restings. Is nad purchased a number of bonds of the . yes benor part said in we in behalf of his olients. .s - result of the - etings, income read (a) to take over the title to the property, and (b) to ours the sulating defaults under the first mortgage bond issue, and thereafter to lesp the bonds in good standing. At the time linears agreed so to do, there was also a second mortgage on the property, securing an injectedness of Thomas andell and wife for 11,500.00, whattel mortgage notes held by Homer wros. for the lance of the purchase of furniture in talled in the property, an unmid oblig tion of 1,350.00 for appets purchased from Mieboldt's, and an unpaid charge of 300.00 for a stoker. It appears that Kerman Mandell, a brother of Thomas andall, who had no interest in the title to the land and building, had joined Thomas sandell in the execution of the chattel mortgage notes for the furniture. In connection with the transfer of title, Tinamen executed an instrument to indemnify Thomas Randell and his wife and Morman Mandall and his wife on ascount of all of said obligations, except the ascond mortgage. Tinstan, however, agreed to pay up to 13,000.00 to acquire the second mortgage notes. Immediately upon the conveyance of the title to him, Fineman made a conveyance thereof to his wife, Christine U. Tinesen, who thereafter held title. Leight & Company suspended business on Jebruary 17, 1830, when a petition in bankruptey was filed against it in the United States District Court for the Northern

and dair years a me of ye bearitter on manuac has simed down osirse does not contained boards is all some and some or all or all of the contained and some or all of the contained and some or all of the contained and t adjust oner, ed his tell contract back sure all sectionists and al ne ands , teament or limit or or that to my entering or interest, that or failure to motify the trustee rail the boardelers, the boards or courous en escuired thould be treated to althoughed. In Mercaher or December, 1999, cartain bendandara and serve nictives of height & lowery hald divide the termination and additional additional and additional ad anidizates secretal has lackneit, alfal at redeemed ady galdeem at Tomer A. Tineman, a Wilman attenuer, abtenied the merings. He bei ni bossi cintelitudi tuma. Carra ada la cinca la vancor a bossilatore behalf of its alleads. As a result of the sections, Timese spread (c) mulicity and other of (a) har appropriate of althe and news sind of men of teleprofit the council hand agayines fails and teleprofits the beads in good standing. At the time "Launca egreed so to do, there promisidable on guinuse Arivered and no elibrate publication a bels our of Thomas fondell and wife for 11,500.00, ancided apregrage nation held by Human irrea, for the ballance of the percelue of thy highest limited in the property, an ubjuid chity tion of Il, 700,00 for corpoda purchased from Metholatte, and an engale attract and from the a staker. had one allebest semed to redsend a allature semund todd arrows the ne interest is the title to who land out building, had all joined thomas bed ast seems seeptron factors off to soldween not at flatner furniture. In connection with the treater of time finance exequied named the other aid bee Headed ermod' Timebut of Jacoustonl as Stance to be all on account of all of religious and the Liebses. the seasal mertings. Timeun, heavy aprest to per up to 1,000,00 temperate the second marginary. Design transfer and extracts at of the title to him. Tinggon made a conveyage through to him wife, Cirlation D. Timmen, nice thereefter held title, teight a Concenty respected business on introduct 17, 2000, when a period by low produces and well desert desirable manufactured and not its desirate health are

district of lilinois. . Ossession of the Property on taken over by the new owner on or offers obranky 1, 1030. Upon so doing, the Tinsacus said Isight & Domesny the sum of 17,071.18, seing payment of all the bonds and coupons theretofors taken up by Leight / Jososny. is a result of this payment, all benis and coupons due and unexid up to and including sevember I, 1989, were retired and expected. The meneral protective committee for the bondholders of bonds underwritten by Laint a Commuy was formed on the ave of its bankrupter. Frior to the trensfer of the title to the finemans, the entills had turned over to the eneral bondholders group, which was negatiating with Tinsman, certain accumulated income from the property in the amount of 3,085.50. After the linearns took ever the aresieus. this general bondholders committee turned over the anid accumulated income in the amount of 3,085.80, to the linemans. At that time the bonds on the syne waner apartments had not been called for deposit. Appelless mintain that the money so turned ever constituted a partial offset to the amount advanced by the lass as to place the issue in good standing. Christine D. linearn operated the property from Pebruary 1, 1950, to July 14, 1835, at which time a tax receiver. appointed by the Younty Court, took over the operation of the building. The Tinemans did not pay the monthly deposits called for by the trust deed. Bonds 1d and 17 came due on Kay 3, 1930, at which time Shristine J. Tinsaan held the record title. Appellant insists that Tinsman acquired bonds membered 11 to 38 after maturity, that they were not canceles, and that they should be considered canceled. He (appollant) argues that a freud was committed on the court in ermitting Tinsman to prove up these bonds on a parity with the other bonds. He declares that if the trustee and the committee were diligent in their efforts they would have discovered that the testimony of Tineman and false, as was later disclosed by his own books and records. Appelless answer that Christine D. Tinsman said the semi-annual installments of interest beginning May 3, 1930, up to and including November 3, 1933;

Stabilet of Illinois. Formension of the projecty on third over by the new course on in income territory by Linea. Dress on deline, the Timmons cald halght & Summay the sun of ty, Willy, being copiest of all the bonds and coupens therefore tries up by let par a Company. blance the and company has bound ils advance but to flower a at .talounce has beritor again 40001 at necessal galfulant has at que wising shad to stelled and the the challest to bear and some set responsible and indicate and as here to record and indicate of the state of the sta brion to the transfer of the title to the Thesens, the unfalls bed galicito; or e. : deidy group evekished leaves etc of were heart with miverence and were charmine income missee greener disavelence off tovo igns nament! the totta .08.200.21 To futore totelunace fire add wave beared saddinee agabledhee lerenes sidd iscome in the amount of II,000.50, to the Tingmore. It that time the bonds on the cyne lister therefore her bond been valled for pendirect and learne manufacture and receipt all the sections and the section of special affect to the mount between he she classed a the land in good standing. Christina D. simuan operated the property from Johnson 1, 1980, to duly ld, 1988, at which time a tex receiver, appointed by the Genuir Court, took aren the elevation of the building. The Thursday did not pay the nouthly isposits called for by the trust deed. Bonde li and ly came due on May I, 1810, at which time diriction is. Thrown held the respect title. 'upollant insists that Tingmen poquired bonds auchered 11 to 38 offer moturity, that they were not conceled, and thet they should be considered conceled, He LITTLISTED AL POLICE DAY NO ANTENNE AND FAMEL A RAIF MANGER (AMAZIMON) Tinomen to prove up three bonds on a perity with the other beads. steds at the til the tructee and the committee were diligent in their are decail to questions the test test test or time and bloom yest estable false, as was later disclosed by his one backs and recerts. Applicas anguan that theisting D. Timmon paid the semi-annual installments of interest impleming my 5, 1889, up to sed including Morenius &, 1979;

to take up bonds numbered 11 to 38 when they become due, from the original owners thereof; that although the natural payments to the original noders of the bonds, in some instances, were unde subsequent to the maturity dates of the bonds, the transfer thereof had been negotiated prior to the respective acturity dates. We have exemined the record and meted the testimony of Mr. finamen in the original foreclosure case, and also the testimony introduced before the special commissioner, and find that no fraud was perpetrated on the court in proving up bonds numbered 11 to 38 on an equality with the other bonds. The record supports the finding of the Dhancellor in the original decree and in the say lemental decree that the disputed bonds were, in fact, purchased for clients of Mr. Tinsman, and that they were purchased on or prior to maturity.

Appellant also maintains that the committee and trustee were guilty of misrepresentation and gross negligence, and are liable for the demage caused to the investors whom they pretended to protect. Under this point he states that the bondholders were kept in the dark as to the defaulte, and as to the fact that Leight A Company held the defaulted bonds on a parity; that the committee manipulated so that the defaulted bonds and coupons in excess of 110,000. To of Leight a Commany were said; that 3,000.00 of the income in possession of the committee was used to pay Leight & Sompany on its defaulted bonds; that this A, MA. AO was lost to the bondholders; that the consittee worked out a deal by which Tinsman was to maintain the future payments, but that the committee ellowed him to manage the property and not to say a single cent on account of taxes from 1830 to 1934, ultimately resulting in the appointment of a tax receiver: that the committee stood by and permitted Tineman to take up bonds numbered 11 to 36 uncanceled without informing the investors of such fact; that contrary to the provision of the trust intenture, the committee did not require finamen to make monthly deposits; that

that design this period Homes I. Timeson erronged for virious persons to cair up bonds modered It to 38 when they become the the other original control thereoff the bonds the a took original helders of the bonds, in some instances, who authorstent original helders of the bonds, in some instances, who authorstent held the acturity dates of the bends, the transfer thereof helders the focus of the feethest of the original foreclosure once, and the testimony of Mr. Ithemen is the original special constations, and fine the testimony introduced before the the court is proving up bends numbered It to 18 on an equality with the court to conds. The recent superstaling of the Chanceller in the the original decree that the disputed the original decree that the disputed the original decree that the disputed bonds were, in fact, purchased on or prior to maturity.

in all and a state and and and a state of the first wilty of minrepresentation and green negligence, and are linke for the darke dense voice true trace and and are being are being and Under this point he states that the bondhaders are kept in the doub as to the defaults, and so to the feet that leight a Company hadeless and dismon out to display a so absortable and blad to 00.000,011 le sasons at anogues has abad bestudieb est tedt oc ising a demonstrate of the co.co.co.co and the pass Angelia in consequent parimits at ac year and a sighal you of house on sessimon out to bends; in this this tribe of real as the introduction of the ade nisimine of ore nemeril delin yd Insh e fuo hefuer telthumou had become of this hereign persistence and dade that gallenging ordered esti nort beset to inverse me isse elgals a yet of fou has yfreque to 1824, withmately remitted in the appointment of a ten receiver; shoot ou wint on namenal bedrivery bun ye books sessioner and their Mous to ereducent air golurolni tweethe halvement of of il harmann first that contrary to the provision of the true independ the did not require tinounce to much depocite; thet

they permitted linemen to prove up the parity of bonds numbered 11 to 38 and the priority of the interest coupons on these bonds; that they permitted defaults in the noneyeast of interest since November 3, 1939. to the date the complaint was filed, and that because of the gross negligence of the committee, the bondholders suffered the following loss: 1. Payment of 3,000.00 in 1950, from income, to beight a Company; 2. Defaults in 1929 taxes - 34,510.86, 1930 taxes - 5,010.74. 1951 taxes - 2,355.65, 1952 taxes - 3,500.00, a total of 15,377.33: Floring bonds 11 to 30 on parity agreemeting 18,000.00; 4. Placing interest on bonds 11 to 38 for Mayember 3, 1939, in the amount of 4,610.75, superior to all bonds; 5. Placing interest saurons 7 to 11 auperior to the bonds of the investors, greating 1,5%.00; 6. Failure to take action to collect the debt from the masers and entered into a deal to release them; 7. Allotsent of 7-1/0 to the omer and .3,000.00 to the junior mort; In connection with this point appellant states that "for the gross negligance of the committee the court allowed it and its agencies (6,000.00 as a reward: . negligent trustee is not entitled to rewards." Sussan states that on January 77, 1930, the trustee, by receipt of a notice from the house of issue, knew that the mortgagors had defaulted, and that the house of isque was claiming that the bonds on which default had been made were being attempted to be placed on a parity; that the trustee knew that under the trust intenture, notice chould be served on the bondholders, and that neither the trustee nor the counities should have permitted the defaults to exist up to the filing of the complaint in 1934, and that the members of the committee and the trustee are liable for their gross negligence. Appelleds point out that as the bonds and soupens which matured Movember 1, 1929, the resort shows that all of these were said and canceled by the Tinemans when they took over the premises in February, 1930. At the time the Tinsmans took ever the property, no other interest or principal was due under the bond issue, the next maturity being May 3, 1930. At that time no taxes were delinquent.

of il haredure absent to priver the our recog of numeric barthree year part full labled sould be enough decrebed out by privates say has it permitted defaults in the noncorporat of interest since Coronier S, 1989, seem add to occupied this bue belit say taislesse add atch add of nationalist of develops synthetime not apprecious and to emendical L. Payment of . Is. On. on lind, from largue, to Light & or hill it a serve out a little rome a latellite, hill all a remarks at latellite. 138, 778, cf. to fatet a .00.000, 20 - senst 2001 20.000, 20 - senst fill In Planting Scotic Li to 78 on southy aggregating Claycoming in Placker interest on bonds 11 to 35 for Movember 2, 1882, in the emant of fa. 615. Ys. augustar to all benda; 5. Flacing interest company 7 to according to the bonds of the investors, surreguling [1,504,00; 8, beauties has avenue and sort rows only sunfice of malifes and or available into a deal to release them; 7. Allotsent of V-1/2% to the ocaer and tales aids dils neiteennee al .congston reint adt of 56.000,81 add settlement and the exceptibles sayin but that that aminds foolinged torill and it is a concise to 00.000. The at los it beatle true tructes is not entitled to reverie," Sugmen states that on Junery 37. was tanned to enuce als more soliton a to Juison at the court side 1920. new owner to make he to the had the head and arong the same and della point over the real had blacked divise on about and held paintails. threshold in an olemen on a series; that has remove been the actionests the trust inicators, notice should be served on the boudholiers, one and hastimen even bloods sattimes out van consure out vantion tout defaults to exten up to his filling of the complete to living out two ne mombers of the committee and the trunces are liable for their rose doing anoques but the beat at the bulles and form which blic men would be the field south france her , 1991 at restarral breaten and conducted by the America ones they took over the president to sebruary, 1810. At the time the Timesea took over the recreaty, t from sit , sunai hand and tohun sub ase Impiented to sure the . Enaponitab oran mores on and that it . Old a day were delinagens,

The 1937 and prior ye rat taken sere paid. The 1938 takes, as a result of the reassessment or ered by the tate for Sommission, were not due and, in fact, did not recome delinquent until July 10, 1930. The 1930 taxes did not become delinquent until day 15. 1931. The record shows that following the general default in the peyment of interest on May 3, 1952, the committee called the bonds for deposit. as soon as the counittee had obtained a deposit of in excess of 20% of the bond issue, it meted pursuant to the terms of the trust deed, to declare the entire issue due and payable, and called on the trustee to institute foreclosure proceedings. Prior to that time no request had been made on the trustee to file a foreclosure. Under the provisions of the trust indenture, the trustes was not required to foreeless. except upon the request of the holders of 20% or more in principal emount of outstanding bonds. Christine D. Tineman paid semi-annual installments of interest beginning May 3, 1850, to and including Movember 3, 1938, aggregating 36,368,50. During the period when Mrs. Pineman operated the property, (from February 1, 1930, to July 14, 1937) in addition to the payments of interest acting 76.965.50, the Tinsmans made disbursements as follows: \$1,745.50 to wieboldts in payment of carpeting; 4,251.50 to Homer Bros. in cayment of the chattel mortgage notes; .7.547.48 to holder of junter sortgage, and in excess of \$300.00 on stoker payments. During this period all of the income was accounted for by the Tingmans and abolied in connection with the property. In sidition, the Tinssens supplemented the income from the property with their own funds to the extent of over \$30,000.00. It was the additional contributions made by the Tinamans that made resaible the payments of interest from 1930 to 1932, and the other disbursements. which were of benefit to the bondholders. The special commissioner found that eliminating the payments to Leight & Joneany and to the holder of the junior mortgage, there was a cash contribution by the Tinomans of 19,845.17 for the menefit of the bondholders. The secumilated income in the amount of 13,085.50 in the hands of the

The 1907 and prior years were pult. The 1978 teres, as a result of the respect eviers by the laste for Constantence, were not due and, in fact, did not become feliuments parti July 10, 1020. the 1973 taxes did not become dellamines until May 14, 1481. to damper and at disarch Levency and privaling test swote broom interest on for F. 1922, the committee celled the hands for deposit. to maps or the countities had obtained a deposit of in erecas of 20% book dears out to cores and of thenesure bases at asset hand and to to seelers the entire the era coyable, and called on the trustee to institute foreologure procedings. Fring to the time no request had been sade on the trustee to file a foreclosure. Indep the provintens of the trust indenture, the trushee see not required to ferenions, Legionize ni eros to .00 to stolded oil to deceme this years emount of outstanding bonds. Ubristing D. Chesnes yaid scal-camman installments of interset beginning may ?, land, to and including promber 2, 1923, aggregating (28, 985.80, auring the cried whom are Pineme numbers for property, these property is 1800, to July 18, 1801 in addition to the payments of interest eggres ting i'v. 255.50; the Timmann made disbursements as fellows: #1,745.50 to wieboldts in payment of for proving it. Solts be Manne into a payment of the distribution to the payment more page no to a construct to reblad of 84,547 to to to the construction of the const was seconded for by the Thomas and explise in connection with the property, in addition, the Timponus supplemented the income from the property with their was funds to the extent of over 100.000.00. was the chittionel contributions note by the Imerune that make passible the payments of interest from 1830 to 1855, and the other disturencents, which were of benefit to the bondholders. The course comissioner found that eliminating the payments to Leight & Junyany and to the not by morning over a new world "problem arising will be appreted off the company and the thirth on the manager of the ent to sined and of 02.000. It to snows off of anomal but the

general bondbolders conditions a test wary of the kirling or more of the property. As the Handalis made such income available to the sager I bontholders someinter, the inter body and a right to turn it over to Mr. Tineman at the time he took over the property. At that time no defaults existed under the bond issue. The assenial commissioner found that the payment to reight a Company for the defaulted bonds and soupons was wide out of the personal funds nontributed by the finance and not out of the income from the organity. e are of the opinion that in all of these finding, the amount consistioner me right. As to the claimed loss to the conductors in the nonpayment of trees, the record shows that the property as operated by the receivers of the County Court and the Direct Court from July 1, 1975, to rebrary 1, 1976. On corpary 1, 1976, an order was entered in the ar receivership proceeding a limit in the tar receiver and lacing Christine v. Tingen in consection wen the condition that all income from the property be applied to three. The entered into reservation and operated the property pursuant to the order from Johnsony 1, 1986, we april 30, 1937. Her husband, Josep 1. Tinguan, seted as her agent from Jabroary 1, 1886, to the date of his death, I reb 11, 1837. Pursuant to the court order, all income during the seriod of operation was applied on account of terms. Ir. fineman received no companiention for his services, although capacity of 30.00 a mouth up to a total of (650.00 were deducted for rental of furniture. As soon as the clan of reorganization as a gradd upon, Christine U. Linaman desded the property to marriet Menning, as notinee of the consittee, for the purposes of the plan, and i mediately thereafter the counittee caused an order to se entered in the foreclosure processings, permitting Harriet Henning to retain consension of the property under bond in lieu of receivership, and directed the said Marriet Horning to apply all the insome toward the captons of toxes. The committee employed sormen I. Wendell to supervise the operation of the presides on behalf of derrict Menning, upon a

- 12 consers to all the best to yours oft our grattleson erablethand lorence of the traperty, in the english who each terms will be the grad of train a to the latter, the latter and a certimor archief and larence, it over to ir. Chest not the time he beat come the groundly. It Line, of . . west and add water bestire adjusted on ents and Fil to transfer the the two years and transfer to the companion of -ace sind issecting out to the char are an ince but shoot besignish ristracts will not? smeant tell to the for him manuel ail to boundles Interes and generally could be fir at total motetime and be our a everlations was as each town to the same lead to the very removed are reserved and tout seems broken but the transport and the truck of sorth add inc druck yanned add to say locar are at her even from July 1, 1982, to returney 1, 1928. On recourse 1, 1974, an manuscraft participates of department the sair of develops and value not received to the control of the property of the present of "read to believe of Agreeved and more energy for a self the anitibous and BEF OF PRESS DEC 18770-CH OLF Interess Day deliverous cité lors ten de order from Schroory 1, 1836, to April 20, 1839. Ter business Merce To add out of the LET . The bound of mont day, and the bedought to the of his death, " con lighty or one to the court of the transmit during the period of operation was applied on assemble of teren, we. timmen yearlyst no commencetton for his nervised, although termined Lagran with has suched when Co. Com to Later a of ou dison a Co. Co. of familiars. As seen so the class of reorganisation was appeared to an to against intend of alterna and alternative and annually at mathematic nominee of the consittee, for the numerous of the slea, and incellabely printed alter of billed Jakes and billione, sailteness at male and the could be a consumer for the line and the could the and Marriet denning to apply all the income toward the supposes of not necessary and illustrate an executive and increase that were the the age limit religion by his tors by any day, and I'v sufference

compensation of 5% of the gross income. The record shows that all of the income was accounted for and used for the benefit of the property and the first wortgage bondholders, and that the insmans somerimated large sums out of their personal funds. The trustee and the members of the bondholders committee sers obliged to sverdise a sound and honest discretion in colling the bonds for deposit and instituting the foreclosure proceeding. to are unable to the sib the contention of recellant that the nembers of the consister and the trades, or either. were multy of migrepresenting the situation to the bondholders, or of any negligence. It does not appear that the bondholders suffered mortgators (the nandells) were not released from ilebility. A deficiency judgment - a entered a rinet them. After a correct pursuell of the record, we conclude that the contention of Justin the trustee and the condholders committee were multy of no limber as misrepresentation which couled damage to the bondholders, has not long susteined.

Appellant further argues that it was the duty of the court to disapprove the sale, to fix an upset price, and to direct the trustee to bid under the powers vested in it by the trust indenture. The plan presented to the Chancellor contemplated the creation of a corporation which was to accuire the property, and the immana at common stock to the bondholders in place of their bonds. 874/2% of the stock was to go to the bondholders and 13-1/3% to the owner of the equity. The corporation was to pay 13,000.00 to lischerge a 35,400.00 junior lies, and to assume all costs of foreclosure, reorganization fees, expenses and unpaid taxes. The stock was to be held in a voting trust for a period of 5 years. The plan was addified to the extent of (1) reducing the owner's allotment from 12-1/3% to 7-1/3%; (2) the appointment by the sourt, in lieu of the committee, of two of the three trustees; (1) shortening the duration of the trust

accounting of he ef the good income. The record these that all of yenever sail to dilease and not bear los not bedacence and manage out and the first conters to be an included and the contributed large were out the first personal foods. . it to me and to door agree in the boundations seeming over a stringer a religious of the newest disordish in calling the bonds of create out institution the To reference out dire same to eleme are at the secretary avactored gording a governor and has posting out to are done and that realisance were guilty of missegraterating the claustion to the hardhalders, on of ony negligance. It has not appe a tiret the boulhalders outlessed ony here by the delay in filter the completed in forcely, ure, sortestone (the head lie) over not releved from Liebbilty, A fortisted and another the colored against them. and their reasons to antimornous and their all missions on throng out to he conveiled to veiling oran northmen analythmed and has natural

to disappyore the coler struct in it by the interiors the four; to disappyore the coler to siret the four the coler in it by the trust interiors. The plan presented to the coleration of the plan presented to the coleration of second stora which we to second in place of their heat interiors. I common stora to the benchmalders in place of their heats. 674/2% of the second was to go to the benchmalders and 12-1/3; to the owner of the equity. The corporation was to go the collection was to go the collection of the collection. 674/2% of the equity. The corporate and unpaid texts. The close was to be received of the struct from 13-1/15 to the extent of (1) reducing the equity allowant from 13-1/15 to the the struct to the struct fire allowant from 13-1/15 to the the struct of the duretion of the trust of the trust

from five to three we was and (a) regustion of the fees of the co mittee and its approise. With the modific times, the court approved the sale and the plan on June 30, 1959, and reserved buling on the objections to the commissioner's recommendations to may fees to appellant's counsel. In the cases of Lavy v. Broadway-Jorgan Mulding Corp., 366 Ill. 279, and livet intensit mak v. ryn wr beach lide. gorn., 385 111. 409, our Just and Jourt resognized the right of a court of chancery to fix an usest price in continue for clasure unles. hile the trust indenture revised that the trustee might bid at my sale, such instrument did not require the trustee to hid. Appellant argues that it was the buty of the chancellar to fir an uppet price and direct the trustee to bill. Paraphy sing the language of the ryn Many Neach case, we are of the opinion that under the provisions of the trust deed and the circumstances of this case, the themseller did not err in refusing to require the trustee to bid, and that there was no negligance or fallows of duty on the trouter's part in falling to bid.

Appellant also ascerts that the plan and sale were both unfair. There is no challenge to appellant's statement that in order to source a sale soupled with a plan, there must be two reculsites, nearly, a fair plan and a fair sale. He arrues that both the plan and the sale were unfair. He charges that the original plan tended to deprive the bundhalders of 15% of their security, and that the assended plan deprives them of 10% of their security. We to the objection of appellant, the common stock ellotted to the county sensor are reduced from 1.-1/2% to 7-1/2%. The junior mortgages was paid 1.,000.00, or 37% of the face amount of the sortgage. He calls our attention to the case of Gase v. Los angeles jumper Jo., 308 U. J. 106, (the reor anisation of a corpor tion under lection 77% of the penkruptcy job), which holds that the stockholders of an insolvent corporation in which the stockholders have no equity remaining, may not participate

Appellant also asserts that the plan and male note both unfair. There is no challenge to appoint that in order to approve a sale coupled with a plan, there exist be two peculation, and the sale was unfair. We charges that the original plan that the original plan that the abertys the bondhelders of 12 of their security, and that the absorbes them of 12 of their security, and that the objection of appellant, the no man alost allotted to the equity owner objection of species, the no man alost allotted to the equity owner of the first the fact of the mortgage, he calls our steamform to the case of the face enaugh of the mortgage, he calls our attention to the case of the face enaugh of the mortgage, he calls our steamform to the case of the corporation under lection for the corporation under lection for the corporation of an isosirent corporation

in a plan of reorganization unless a fresh contribution is made by such stockholders to the corporate essets. In <u>United Little and rust</u>

Oc. v. ortall, 337 Ill. App. 649, (abstract coinion) this court said:

"It is a matter of common knowledge that business men regard such intervening rights as having considerable sale and the payment of considerable same to get these out of the may is not unusual."

Cur view is that the holding in place v. Los angeles quaber 00.. supra., does not affect what was said in Chicago vitle and Trust 00. v. tortell, In this state the mortgagove, the title holders and the junior mortgagees have retemption rights, and therefore, they have something to contribute in working out the plan. It is common annualedge that a bondholders committee may be unable to proceed with a plan of reorganization unless they have disposed of the right to redeem. As to whether the sale was fair, the property was bid in by the nominee of the committee for 140,000.00. Under the opinion in the Pryn Nawr reach case, it is necessary to add the amount of all unnaid tarms to the amount of the sale bid of 140,000.00, plus taxes, makes the total cost of the property to the depositing bondholders approximately 105,170.13. A consideration of the record satisfies us that the

refusing to force the return of the 5 commission which was raid to horsen wondedly for management. The court euthorized the owner to remain in possession under a bond. Appellant contends that the statute which authorizes the court to permit the owner to remain in possession under bond, foca not authorize the owner to charge for sanagement. The owner was a nomines of the bondholders committee. Although the statute does not say anything about compensation, under its general equity powers the court had a right to allow management fees to the agent appointed by her. We are unable to say that in so deciding the Chancellor abused his discretion. To have also considered the point that the fees allowed to the depositaries and to the committee were excessive. We cannot sustain this contention.

is a plan of recommended unless a fresh contribution to made by anon acceptable of fresh and treet on acceptable of the source o

has been all to be not the or seem and because to broken being all

toes not affect want was said in Citera Fitle and Frust Co. V. Perfell.

In this whate the martgagors, the fitle halders and the junior
wastrayees have nedem tion rights, and therefore, they have semething
to contribute in working out the plan. It is seemen browledge that

lon unless they have disposed of the right to redoom. is ether the sole med fair, the proverty was bid in by the momines of the sole med fair, the proverty was bid in by the momines over the same, it is metersory to aid the amount of all unpoid terms the the amount of the same bid to assertain the ories bring paid for the case of the property to the depositing bandhelders approximately addition of the record retiafies us that the Chanceller was right in confirming the sale.

Appellant further convenie that the court and in error in refueing to force the return of the Standard and the coner to Marmen Arabell The accurate the court authorized the coner to reach in possession under a bend. Appellant contends that the statute reach in possession under a bend. Appellant contends that the statute which subjects the court to possession and subject to subject to charge for management. The owner was a newhorker the bandholders countities. Although the statute does not not anything about compensation, under its reported about promote the court had a right to allow management force to the equity promote the court had a right to allow management force to the specialist appeal by her. We are unable to any this in ac decising the Chancellor abused his bisorstion. We have also considered the point the face allowed to the depositaries and to the sometimes and the face allowed to the depositaries and to the search the face allowed to the depositaries and to the search the face allowed to the depositaries and to the search the face allowed to the depositaries and to the search the face allowed to the depositaries and to the search the face allowed to the depositaries and to the search the face allowed to the depositaries and to the search the face allowed to the depositaries and to the search the face allowed to the depositaries and to the search the face allowed to the depositaries and to the search the face allowed to the depositaries and to the search the face allowed to the depositaries and the face allowed to the depositaries and to the search the face allowed to the depositaries and to the search the face allowed to the depositaries and the search the face allowed to the search the face allowed to the search the face allowed to the search the se

13 Finally, appellant urges that the denial of fees for services rendered by his alterney, was onearranted. The aproish sometioner. the at the roughly resilier with the extent and value of the erroices rendered by sourced for the appoilant, reconsended that they be allowed the one of 1, 30.00. Asselless puint out that oll of the medifications in the mian as adopted by the court, were not induced by the efforts of counsel for appellant. That obstanout is correct. Mevertheless, the efforts of counsel did result in benefit to the boudholders in that the share of the owner in the stock of the new cor or lion was reduced from 12-1/2, to 7-1/2; the deposit-ry fees were reduced from E. 380.00 to 11,579.00 and the committee's fees from 1,187.00 to 13.015.00: the torm of the voting trust and shortened from five to three ye re, and the protective committee and deprived of the privilege of naming the majority of the trustees. In first National bank v. Labelle-lacker blds. Corp., 360 Hil. top. 188, se affirmed an alisance to atterneys for benchelders who appeared and recoured changes in the olan. As the estate was benefited by the services rendered by apuncel for appellant, - are of the opinion that he should be lived re-sonsole fees to compensate them. Having con-fully considered the feets and circumstances presented by the record, se find that 1500.00 is a resonable fee for the services randered by counsel for a all nt.

for the reasons stated, all the orders and decrees an animal from are officeed, except the order entered eptember 11. 1989. which is hereby mented by allowing the sum of 1500.00 to Louis warms, appellant, for the services rendered by his attarneys. Jo amended. the decrees and orders of the Circuit Court of Cook County are affirmed.

> DECREES AND ORDERS AFFIRMED. AS AMENDED.

Finally, and and the the donies of fore for course conformat by the autorory, one was contact, the country constrationers. the the sucretly femiliar with the transfer of the protect Assert of their party to be historians and the party and described the sections in the clea is edepted by the court, ere not unuest or the e Marte and described and are successful to the contract and former and on averladions on at different to figure the fluorer to proper to arrette and now Halversey you was set to Soute and al manus and he arede and popt reduced from 13-1/Ki to V-1/Ki; the depository from rore rore from at Co. Vellay not less's the committee's fees than Co. 1910. No. er soil mort benevacio ace tours painer suit le mast suit police dis equilibring out to ben'ingel, see emiliance existence of the payer and of maning the unjoyity of the tensions, is light indianal tonic w. intelles maken liter on . 180 ill. 189 . . con all maken mail internation ad a storage for benchmarker who experies have a server of class, as the engite was concilled by the apriods sandered by counsel baselle on Alonda od, 1 dd melatro ed to era a guallace rei responsible foos to compracte them. Moving care fully considered the fig. 2011 tell tall or according by the record, we find that \$1000.00 is a paragonals for for the previous regulared by coursel for a relient.

ior the remains stated, all the orders and decreas empeled the attention of the colors of the summan is hereby enemed by allowing the sum of 1500.70 to Louis dumma, experilant, for the services randored by his attorneys. In marriad, the decreas as the Directic Laure of Dook Causty are efficaed.

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OTHER S. CHARTAN, P.J. ALD WEST, S. CHAR.

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CHARLES S. VITC and WILLIAM M. MATT.

(Plaintiffs) Appellees,

YOURSIDAL COURT

APPEAL FROM

STANDARD INSURANCE COMPANY OF MEN YORK,

(Defendant) Appellant.

OF CHICAGO.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

For some time prior to October, 1938, plaintiffs owned and operated a tayorn and night club at 1054-36 best Madison Street. Chicago, under the name of the "Club Mendevous". On the first floor there was " ber and " restaurant. The second floor consisted of two six room flats, separated by a solid partition. The flat over No. 2934 was accupied by plaintiff filliam H. Katt, an attorneyat-law. He occupied that flat as his home and a part time law office. That flat was also used for keeping the sup lies and as an office for the tavern and cabaret business. The record is confusing as to the occupancy of the flat above No. 2956. On October 28, 1338, in consideration of the sum of 1825, plaintiffs made and lelivered a chattel mortgage covering all of the personal property in the presises. to the First United Finance Corporation. The indebtedness was to be repaid in successive installments of \$15.00 per week. The mortgage loan was made by the issuance by the finance commany of three checks payable to plaintiffs. One of the checks in the sum of 100.00, was endorsed by plaintiffs to the National Oak terister Company; a second obsek in the sum of 161.95 was endorsed by them to another finance company, and the money for the belance of the loan was apparently retained by plaintiffs, we the third check was endorsed by them in blank. On Movember 19, 1938, defendant issued its nolicy in the sum of 44,000.00, insuring eleintiffs for a term of one year against direct less and demane by fire. The molicy is a "handard insurance policy, to which is ettached a Chicago board Standard Contents

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DEST ACTUATION.

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ADMINISTRATION AND RESIDENCE

January (Ammerica)

AND SUPPLIES SOLD FALLY FOR THE CANDER OF THE COURT COURT, For some time prior to Crtober, 1980, plaintiffs sage. . from the meeting the US-188 To do In this has marred a had reco had ander the news of tee 'vlub leaderene", on the first Tlear To because the table and and the transfer of his transfer and the transfer town that our products as not be sent the source of the that more than the court that the court than the court the lifet was appoint by children't Million to 1985, on objective ch-law. We perupied the filet on his home and a park time law affing. soilte as er and seiles me suit migras hat been cold as fell s as no principal of branch off, and property of the principal of the cooppancy of the first above No. 2005. On October 76, 1839, in a persylia: bae shem allifulded. ESS le mue add to deliverable ... chattel moregage severing all of the personal property in the president, to the first United lin now verger tion. The independence are to be strain in waterstart travellarers of ICLUS per main. The markets anada sarai to yangaa oon al'h asis yd aanuusi ad yd ahan sen mal per 10.00 to must he case of the cheers in the cum of 100.01, was a communical regularity in Landerth wire of Principle of Secretion weddens of soil we became as all. Il to man add ni doeds brooms finance company, and the money for the belance of the lone were er cruily retained by maintiffs, on the third chack was endoped by them in blank, (in Bowedon 19, 1988, defendent Lamos its malow in the sum of 14,000,000, insuring plainters for a term of one year tired loss and deaner by fire. The policy is a "tendered elaninot trabatt breek openial a bedesive at drive of gollog source of

Form. The body of the solicy contains a clause that "unless otherwise provided by agreement in writing added hereto this Jempany shall not be liable for loss or demoge to any property insured berounder while incombered by a chattel mortrage, and during the time of such incumbrance this Company shall be liable only for loss or damage to any other property insured hereunder." The Contents form, in part, re ds: "14.000.00 on contents (as described hersin) shile contained in. on, or attached to the brick building situated 4034-36 est Madison Street, Chicago, Illinois. Mote: For information only -The principal business of the insured is (describe neture of occupancy and merchandise covered) Towarn. The term UCLY of the used in this policy shall (except as otherwise excluded) include merchandiss. stock, store, office and shop furniture and fixtures and machinery, apparatus and equipment, supplies of every description; property on which liability is required to a specifically seamed by the conditions of the policy; the insured's interest in personal property of others when the insured's interest in such personal property is not otherwise insured: " " The purchase of property on the installment or part payment plan shall not invalid to this insurance and this insurance shall also cover the insured's interest in and liability for property described in this policy, surch sed on partial payments." On January 13, 1939, by authority of a search warrant, federal agents found a still and paraphernalia for the distillation of alcoholic spirits in the flat above No. 2036. On that day they arrested Charles . Vito. one of the plaintiffs, and charged him with operating a still. He was lodged in the County Jail, but was released on bond and came back to the premises. There was a fire in the premises on the morning of January 39, 1939, between 5:00 a.m. and 7:55 a.m. Between the time that Vito was released from the County Jail, he was in and out of the premises from time to time. At the time of the fire the plaintiffs sere operating the tavern without a license. At the April Term, 1939,

Form. The body of the splity contrine a tlevet ba ? 'unless otherwise for Linds queent what oftend bette politic at browner, a of habboors allies takingered serviced present year of an ele me and ret offelt on down by must add galach but any grand leasted a 4d houndament incumbrance this descent child on itable only for less or demons to our other property inquest hereanier." The Spriests tore, in part, banisiano sitto (micros bediraceb as) educateo so co. Con. 1 1 1 1 22 in, on, or nituohed to the brish heliding situated CAM-00 and - Then Darest Unions, Hillands. Note: For Internative only vancuoses to senden address to become our to usenioud Explains of mist at Pass are billion and od! arrest (heroco methanderen and sailer shell (except as otherwise establish lacked acrebandies, erecided and every first seasons of the east to work a stool and seasons. opporatus and continent, emplies of every description; requerty on strict Licelity is sentered in to questifuelly something in the state of and the caregory Longues of decounts a Laurent of the and the when the immend's interest is such paramal property is me whereise inequalistical add no proposed to sendance only a a charment somment sind bur steerwest tied at blivest for Lieds and Janayes yérasora ner yélikésik kur ni tarrank a'hannak sás meyes eska klede described in this palloy, surely on pareirl payments, " on Jensery that their elected freelet giverner ereres a la grandine tel fillet all si attrice effector to suitefficall out tot effected and has litte the flat about Me. IREM. In that doy they arrested Checkes D. Tito. one of the guitarage ditty and begulde bue attliately edy to one ited tase has buck no basseler are tod thek years and at bogbol to the premises. There are a the is the premises on the morning of January 32, 1983, between \$100 u.a. vad 7:35 v.m. Sebraen the time the one has all and all place the property desired by any old? State The president from time to these, or the time of the time the cholestern CORN agents also the transmit a Standard movement and delivered actions

the Jederal Grand Jury of this district returned an indictment against Vite and others, charging them with unlawfully operating a still.

He was convicted and sentenced to serve a term of two years in the rederal sententiary and to pay certain fines and penelties. On may 30, 1970, claimiffs filed their statement of claim in the bunicipal Court of Chicago and maked for judgment against defendant, based on the fire loss they suffered while the chattels are covered by the insurance colicy. The case was tried defore the court eithout a jury and resulted in a finding and judgment against the defendant in the sum of \$3,471.00, to reverse which this appeal is presented.

The first point urged by defendant is that the breach of the condition in the policy against the property being isomebered by a chattel mortgage bare the plaintiffs' right to recover. . 'laintiffe conside that under the las, a provision that the insurance company shall not be liable for loss or cases to personal property male incumbered by a chattel mortgage, is valid. -laintiffs, however, contend that the language of the Chicago Board Stanfard Contents form. which as have quoted, negatives the printed language in the body of the colicy. This form at ten that "the term of There as used in this policy shall (except as otherwise excluded) include " " " the insured's interest in personal property of others when the insured's interest in such personal property is not otherwise insured." It is the law of Illinois that an ambiguous insurance contract is to be construed most strongly against the insurer. The role, however, applies only in cases where reasonably intelligent can will beneatly differ as to its meaning. If a policy of insurance is susceptible of two interpretations, that one will be adopted which is nost favorable to the insured in order to indemnify him for the loss which he has sustained. "The rule that ambiguous langua c is to se construed most strongly against the insurer does not authorize a perversion of language or the exercise of inventive poeers for the purpose of creating an ambiguity where more exists." (Grosse v. Kaichts of John .. the sale of Seal Seal day of this district returned in inlicement which the general real seal seat out soutened to serve i into of the years in the rederal realtesting and to say servicing fine and rehaltice. On top to the fine the intition this their statement of claim in the wantestion files their statement of claim in the beauties of the sale that the tentest by the incursace policy. The own was tried before the court atthough a jury and required in fine case and furgicus a line to defend a first sale to the defendant and real seas the court atthough a jury and required in a final seas and furgicus a line to the defendant.

to govern sir fader to turke deb yd copys umboy fati'i adi' and forming and the college of the form the party being and at no the continuous and a manufacture commence on trains within the term of the particular of conside that under the Long a worldton that the insurance company milite virence: Leductor at some was and told all ad for fless tenness of the party of the sentence of tenness, contend that the language of the Chicago heard Standard Contents tory, to their subsect to the printed the printed lengue over the best at at heer so till 7.00 aret adt tait covers aret aist .veiles adt ect " " abulast (habulars selected) as Second) Ilada vailos aidi athorness and node eradio to through Londere al bearing a braucht of Al ".larged anieradic ten al propony Lanceron does at test and as as at the range manufacture in the state alorated to rel oth carried wort strongly against the insurer. The role, however, applies only in essens where recusably intelligent can will beneatly to aldityprane at concruent to valley a "I senterm of at as retail eliments your of rather depute of like any field untilt-respectations end and dolder need and tol said the tot the less which he has To MALITYTE, & beleasion for some seweral of forling allowers To recover self tel promes orlinoval le sulpress and to examinal C. to straig or people "setate and state of legion on paircess

"54 11. 80. 88.) . Laintiff insists that the rider abreates the terms of the policy with reference to incombrances, and that dagacquently at the time of the loss there was no violation of the torne of the policy. The shattel marker o clause in the policy specifically provides that the source y shall not be liable for loss or trange to property includered by a chattel mortunge "unless otherwise provided by agreement in writing added hereto." is agreement in writing as added to the solicy, unless the "contents form" is to be construed as such added agreement. It will be observed that the language of the contents form upon which wintiffs vely as absorption the terms of the policy with reference to incumbrances, defines "contents" as including, unless otherwise excluded, the incured's interest in personal property of others. Hence, the insural's interest in the personal property of others is not within the coverage of the policy if "otherwise excluded" by the terms of the policy. In mor view. there was no subliquity in the language of the policy. . . . of the opinion that there are no agreement in writing extending coverage to the personalty in the presises while incumbered by the chattel cortange. Therefore, plaintiffs could not recover.

plained of occurred shile the based was increased by means within the control or knowledge of the plaintiffs, and is excluded from soverale. A slause in the policy provides that unless otherwise provided by a rement in writing added thereto, the commany shall not be liable for loss or amage "while the hazard is increased by any means within the control or knowledge of the insured." The raid on the still occurred on January 13, 1939, at which time Charles W. Vite, one of the claimtiffs, was arrested. The still ceased operating on that day and was removed from the premises. The fire occurred on January 19, 1939. Therefore, at the time of the fire there was no increased basard because of the operation of the still. No ever,

ted (11. 80. 80.) Haintiff include the time obregated the -nee and the premercoupait or renewater drie voting and to serve secured aff to melysicaly on see study tool air to outy and the viscounces of the rulley. The chettal martine clouds in the policy tentifically of the tree seed to be eldered and for finds progress and finds assistant habiyero esistendo sesious enculton latitudo o ye becomboni yesunase by errecent in writing class bards. * is treesant in writing inguitation of of al "great education" and scalar, quilon and or behin any to a sure side that berreads at Ille il . Sure are total and are the contents for any ship state of the server the torner the torne of the policy with reference to include noun defines about the mi survival attenues only abbulars entered to accurate publication ed al derect ethores, the chere, the inverse length of goings with the exercise out alidia that all arease to yether or importing if "otherrise evoluded" by the terms of the colley. In cor case, there were no ambiguity in the language of the policy. - were of the as a crew of there a no agreement in writing entending covers a to she arresunity in the promises while incombered by the chitic surfaces. creeners due bland ett. Itubilit prestresser.

The second point ergued by defended is that the lass complaised of ecoursed while the hassed was impressed by mens within the sentrol or incrising of the plaintiffs, and is excluded from severa.e. A sixuse in the policy provides that unless otherwise provided by extrement is critical wind thereto, the commany shall not be include for lose or indegs "while the hazard is instrumed by any means within the control or knowledge of the insurad. The raid on the ctill occurred on January 13, 1809, at which time Charles W. Fite, one of the piristiffs, was exceeded. The still occurred on that day and was removed from the presises. The fire three covered on January "S, 1879. Therefore, at the size of the three presises.

defendant infers that there was an increased hazard at the time of the fire due to the fact that Vito, after being released on bond from the Sounty Jail, continued to visit the presises outil the time Serondant insists that all the pirconstances in evidence of the line. in connection with the oper tion of the still and the activities of Vito. show that there was a moral hazard at the time of the fire. We are of the opinion that the fact that Vito was charged with a orise would not in itself be sufficient to establish that the heard was increased at the time of the fire, particularly shen there was another insured, namely illian R. Fatt, whose resut than any not questioned. Under this point defendant also mintains that the begard was increased by the fact that the tavern was being operated without a license. It operated under a license in 1938. Up to the time of the fire the laintiffs had not appeared a license for 1039. e are unable to egree with the contention of defendant that the failure to procure a license increased the hazard.

for the reasons stated, the judgment of the hunicipal dourt of Chicago is reversed and judgment is any said here for costs for the defendant and against plaintiffe.

SEVERSED AND JUDGMENT HERE FOR COSTS FOR DEFENDANT, AND AGAINST FLAINTIFFS.

DENIS E. SULLIVAS, P.J. AND MEDEL, J. CONCUR.

to east of to be said become to see that I di make tocherist. has fire due to tan fire ture Vito, affect being released on bond was the County deal countries to wish the contract this countries with at tis e. il. e. . Aerbendant incinent that all the siron establish . e. il eit ta in consection with the entration of the still and the activities of atte, since the theme was a more i accorded time time fire fire a file to redo and add sent set and sent malaboa add to our an translate the full torse at their News of theel at the bluer buits men improved the time of the first particularly sheet the contract In his collectioner bands after it bellies glasse stemme radions cars figured. Indee this paint defounces also entgenes the the heavene united are never set to it for I had becomen and house sithert a license, it exercted under a license in 1939, . BENE tel surveil a horsesor den had efficiently mit well and to make age todo springer at to maitingsoon and dala serve as safeny and a. foliare to exempte a licensed terresed the briefly

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MARIE VYSKUCIL BOLEJS, Assigned of Andrew Bolejs.

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APPEAL PRON

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LITHUANIAN BUILDING AND LOAN
ABBOCIATION.

OF CHICAGO

EHWICIPAL COUNT

Appellint.

305 I.A. 498

MR. JUSTICE BURKE DELIVERED THE OFINION OF THE COURT.

On deptember 4. 1935. Andrew Bolejs Tiled his amended statement of claim in the Municipal Court of Chicago. He alleged that on December 1, 1931, he was in possession of certain personal property of the fair and reasonable market value of \$3,500; that on or about that date the defendant wrongfully selzed the property and converted the same to its own use: that he demanded the return thereof and that defendant failed and refused to comply. In an affidavit of merits the defendant denied the allegations. The trial resulted is a verdict finding the issues against the defendant and assessing the plaintiff's damages in the sum of \$600. while a motion for a new trial was pending, an assignment by the then plaintiff to Marie Vyskocil Dolejs of all of plaintiff's right, title and interest in the cause of action, verdict or judgment, rendered or to be rendered, was filed. The court everywheat the motion for a new trial, entered judgment on the verdict and ordered that all subsequent proceedings be carried on in the name of the assignee. An appeal followed and this court in an opinion filed Barch 16, 1938, in case No. 39643, (Abst. 294 Ill. App. 608) reversed the judgment and remanded the cause for a new trial. After the cause was redocketed the defendant filed a counter claim in the sum of \$134.93. grounded on a judgment for costs rendered in this court when the cause was remended. In the answer to the counter claim the assistance ascerted that the defendant was not entitled to a judgment against her. Getober 9, 1939, the assignee filed a second amended statement of claim,

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305 I.A. 498

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On sentender 4, 1886, Antrew Holes 111 of his country of the word at aleim in the Manusipel Court of chicage. In alleged tast on December 1, 1881, he was in covered in all certain personal property of Ind Trade to no fact | 180 () to enter Jeffer addennage has that with getal add beforenon but yourgone odd bankar yffulynoud findaulad ad for our tab forth for transport marks and balance and full year awa will will tribe the call relief to the call of the call of the call of the call of denied the silegations. The trial resulted in a verdiet finding the mi company a this daily sit intersect for thoughts aid femings sound on size as a life a continue to a rate of the continue and the continue an -airly to the To special Heavier water of this side and add ye from visite right, title and interest in the cours of action, vertice or judgment, rendered or to be vendered, was filed. The court everyden the motion for a new twist, entered judgment on the version and evident the all subsections ereserting the coupled on in the news of the complete the country and the country of the an addition the complete the country of the country 16, 1933, is once Wa. 20042, (that. The Hil. App. 2008) reversed the gen game and golla . Laird was a not sauce and laborate has ver All the may not al alaly grammer built tarbarrab and total some will your true a life at brackers attend at Inamibil, a po to The transport to the country claim the engineer processes defendent was not entitled to a judensur sining her. satisfied by Licensey's believed become in the III wear, bear will provide by walling and which was substantially the same as the one previously filed. In an affidavir of sarite the defendant joined issue. The course was tried before the court and a jury and resulted in a verdict for the plaintiff on both the second amended statement of claim and the counter claim, and damages were assessed in the sum of 15,000. Defendant noved for a new triel, for a judgment non obstante veredicto, and in arrest of judgment, all of which motions were overruled; and judgment was entered as the verdict, to reverse which this appeal is prosecuted. For unavenience, we will refer to the plaintiff as herie and to the sasigner as Andrew. The assigner, andrew, and the assigner, baris, are husband and wife.

The first oriticism leveled at the judgment is that derie, as assignee and owner of a non-negotiable chose in action, did not in her pleadings on oath, allege that she is the actual bone fide owner of the chose in action, and did not on oath set forth how and when she acquired title. The record shows that at the time the assignment was offered in evidence, the atterney for the defendant announced to the court that he had no objection to its admission. It was thereupon admitted as an exhibit. As defendant did not make the point in the trial court, it may not urge it here.

prior to the retrial of the case, plaintiff endeavored, by a motion in this court, to produce the original exhibits received in evidence in the first trial. Defendant, in sounter suggestions, pointed out that the judgment for costs, rendered in this court, was unpaid. We denied the motion for leave to withdraw the exhibits. Thereupon plaintiff procured certified copies of the exhibits. These copies were received in evidence on the second trial. The second point now unged by defendant is that the court erred in admitting the certified copies of the exhibits. We have examined the copies and the originals and find that the copies are exact photostatic copies of the originals. Furthermore, the exhibits tend to prove matters about which there is little, if any, dispute. Defendant has not shown it suffered any harm by the introduction of the certified copies, rather than the originals.

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The More entered at a non-manufacture in content to the factors of a content of the section of a non-manufacture and an anti-man did not in land in landing an anti-man filter of the first section and and all suff on setting the condition and the choice in action, and will suff on setting the factors been and when we have the condition and when the condition and all setting the conditions are the conditions.

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The third point advanced by descendent to that plaintiff failed to prove the allegation of conversion by a preponderence of the evidence. Defendent also maintains that the court erred in denying its motion for a directed verdict. Defendent then states that the measure of damages in an action for wrongful conversion of personal property is the value of such property at the time of the conversion, and that the damages allowed by the Jury are excessive. Finally, defendent argues that plaintiff failed to establish the necessary elements of agency to bind the defendent corporation. As all of these points involve a consideration of the evidence, we will consider them together.

Plaintiff does not challenge the statement that the ellegation of conversion must be established by a preponderence of the evidence, and insists that there was ample evidence to show a conversion,
as charged. Plaintiff also concedes that the measure of damages is the
value of the property at the time of the conversion, but insists that
the evidence as to damages supports the vertict. Plaintiff also asserts
that she established the necessary elements of agency to bind the defendent.

In 1925 Andrew traded a farm in Wichigan for the real estate and improvements located at \$301-3 west 22nd Place, Chicago, consisting of a two story brick building. At that time the property was subject to a first mortgage, owned by defendant, in the sum of \$7,000, which Andrew agreed to pay. He paid about \$3,000 on the mortgage. The defendant foreclosed the mortgage. The period of redemption expired in December, 1931, at which time the defendant took possession of the property. The first floor of the premises was divided into two stores, one of which had been occupied as a butcher shop and the other as a salcon. The second floor was used as a dance hall. In December, 1931, at the time defendant took possession of the real estate, the personalty which is the subject matter of the action, was in the premises. This property consisted of such furniture and equipment as is usually contained in

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In 1978 Andrew traded a real last place, Trinses, trinses, trinser, an intiant and improvements located at 1801-1 and last place, Trinses, Trinses,

saloons, but ther shops and dones halls. There is evidence which tends to show that in the month of December, 1981, the defendant, by its servents, out a lock on the doors of the building, and that because of such action. Andrew was unable to remove the fixtures. Testisony was introcood that in the years 1932, 1933 and 1935 the defendant lessed the premises and chattels to various parties. The proof also shows that various demands and attempts were made by Andrew to procure the chattels. There was competent evidence in the record which verranted the jury in finding that Andrew had a right to the possession of the chaitels; that they were wronafully sonverted by the positive and tortious conduct of defendant: that demand was made for the return of the shattels, which was not complied with. Plaintiff proved her case substantially as laid in her second amended statement of claim. We have also considered the point, urged by defendant, that plaintiff failed to satablish that the persons with whom Andrew dealt in the transaction, had a right to act as agents for the defendant. The record shows that during the trial, counsel for the respective parties stipulated that certain persons during certain periods were officers of the defendant corporation. We are convinced that this stipulation and the evidence in the case established the arency of the various persons mentioned in the testimony. Such testimony was. therefore, admissible for the purpose of binding the defendant.

Finally, we are called upon to determine whether the damages are excessive. In the previous trial, on substantially the same testimony, the jury awarded 1800. We have carefully considered all of the testimony and are of the opinion that the damages are excessive, and that the judgment should not exceed 1,500. Therefore, if within 10 days from the filing of this opinion plaintiff will file in this court a remittitur of 1,000, the judgment against defendant will be affirmed for 1,500; otherwise, it will be reversed and the cause remanded to the Nunicipal Court of Chicago for a new trial.

NIMEL, J. and BENIS E. SULLIVAN, P.J., CONGUR. JUDGMENT AFFIRMED FOR 11,500 MFOR REMITTITUR OF 11,000; OTHER 13E JUDGMENT REVERSED AND GOUSE REMARDED.

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HGMER D. HOUANE,

Appellee.

THE ACOUSTOCK TYPESRITES a corporation.

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OF ONTOLOG.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

befordent is an sed in the business of some oturing and selling type-riters. On July 1, 1934, slaintiff was hired by intend nt as a typewriter selection under a written agreement. The territory in which he was permitted to solicit business was known as the loop district of Chicago. In the fall of that year he was transferred to the west si'e section of Dhie go. He was then shifted to the northwest side of Chicago, and then to the north side of Chicago. In October, 1936, he was given a new contract, which permitted him to solicit business in the area west of the river between makington and "bth structs, which the parties call the rest side territory. The contract provided for the payment of a salary of 19.00 and and a commission of 10, on typewriters cold, "anid commission to be credited and said in accordance with the rules of the commany. The employee hereby acknowledges that he has seen and road the rules of the Company now in effect. The rules promulgated for the guidance of calcamen read, in part, as follows: "Orders. 1. Wegular form of order " " * to be used by salessen and signed by sustour in every instance. 5. ill sales orders must be approved by the mager. 6. hen a concern of good financial standing issues its out purchase order forms, this purchase order will be sufficient, but a lessen should obtain the regular signed order in dusticate to confirm any purchase order when oustomer does not have proper oradit rating. 7. all original orders sust be signed in ink or instible agail. Contracts. 2. Contracts providing for future deliveries are not considered as orders, and will not be laced by the credit of releasen

AL PERCE SHIP SHIPPING OF WICHES SHIP OWN,

Isferdent is entryed in the besizes of went-charles and anling typeseiters. On July 1, 1934, claintiff our kired by tetemant as a beginned to the sale of the second to the second to the he was permitted to solicit business was heart be less in district of Chicago. In the fall of the type he was broughtered to the west will escal in of Chisage. He are then willied to the northand side of Unicore, and then to the morth with of Chicago. Cotober, 1988, he see given a new contract, valoh garmitted him to has perpaised product revir and to feet para and all annalsed finises Afte etropic which the parties said the west size torritory. The contrast experient for the parame of a salary of motions sandens a consission of 17, an typestiters and, "sill consistent to be uredited and paid in second nos with the reles of the content. The to salur add bear has need and ad dadd sambalecades wired asynigmo the dominity has in effect." The raise usesuigned for the guidence or salegen med, in part, as follows: "Cuders, 1. Lagular form of order * * * to be much by suleason and signal by customer in centry instance. 5. All seles griets was be requered by the sparer. C. then a concern of good financial atomism tweese the con tarefactor the and the property of the water appropriate the property one artings or of others at tring beagts relager and mistig blunds A DELIVER OLD THE TRANSPORT WORK FAIR STAND THROUGHOUT PRINT WATER WATER THROUGHOUT The sale organical extreme must be absorbe to bear applied fortaken by too era autroriato control per publicación allegatud. La contraction Conseiled to Hibbon adv of Swinds of the Life has appeted to Sectionary on the books of the Jamesy. The orders follow as separate parts of the transaction which are placed to the croiit of the colessen. But in case the aniseman should is we our employ, or recept a transfer to enother branch, he will have no further interest in any contract, and no commission will be payable on orders placed by the oustower and accepted by us ofter he has severed his connection, even though wild contract may have been originated or closed by him." "tarting with October, 1936, plaintiff began calling on all prospective customers in his territory. In the source of his duties, he called on ar. Cocil B. Thomas, who was the buyer in the purchasing department of lears losbuck & Company. He succeeded in selling 50 typerriters to Terrs Rockuck & Commany in February, 1937, and IE additional types riters to the same corporation in March or Poril, 1937. He was paid a commission on these 75 typewriters at the rate of 105 on the sale price. He again called on Mr. Thomas about the middle of June, 1837, and endeavoyed to sell 100 more typewriters. Flaintiff left on his vacation on June 18, 1937, and returned on July 6, 1937. It that time Jacob i. Thrusher, who was then Chicago sales manager, informed plaintiff that he was going to reduce him to the status of a junior calescan, in which capacity he would be paid a salary and no commission. Plaintiff declined to continue as a salesman under the proposed change. He maintained that he was entitled to a commission of 10, on the sale of an additional 100 typewriters to Sears Rosbuck & Company and on the sale of typewriters to three other parties. He filed a state ent of claim in the Municipal Sourt of Chicago on January 9, 1939, and therein elaimed the sum of \$70.20 on the basis of 100 typewriters which he werred he was instrumental in selling to lears combuck & Company at a price of 8,70%.00. He also claimed a commission of .112.50 on the basis of 10 typewriters, which he sileged he sold to the Gruver Manufacturing Company, thus 11.25 as a polance due him for having sold two typewriters to the Outlook Invelore Company, and a belance of "5.6% on the basis of 1 typewriter, which he averred he sold to George F. McKiernan, or a total sum of 739.635. An affidavit

on the books of the Jospany, the orders raller we arrests parts of the transaction raids ore placed to the cale artic salesans. But in case the selector chyeld leave our two control of transfer to emotion cranen, he will have no further interest in any centract, and the tweetest of the property of the released on socopted by us after he has sovered his connection, even though ailf drive midtail ".mid we has all to be be all its most sven you town to remember principle public property lings and ling on the property of the property of the principle o In his territory. In the source of his duties, he colled on mr. loot) in sua, the hard in the purchasis is revened as the contract & Company. He succeeded in scaling 39 typesetters to four Springs & despany in isbreaux, 1937, and 25 civition i typestiters to the came are retion to dered or best, 1937. He was not a sommerlen on those VE byperfiters to the rate of 104 on the orion, He again colled on T. Thomas a boat be middle of June, 1887, and cadesveres to sell 100 more typertitors. Finish that as his vecation on A speck and such so the parties of the the the land the time of threader, and was the Chicago sales assert informed acade see be one going to reduce him to the etches of a justice erisearchin which capacity he would be paid a salary and ac camingion. Claimitet an a made becomes the terms measure a on aunitage of beniloss alor out no 401 to anisalment a of halfithe are an full beninfalaof an edditional 100 typewatters to learn against a lowerty and on the eale of typewriters to three other earties. He filed a seresona of claim in the Municipal Court of Chicago on Jenuary S, 1839, and emotivescyt CCI to gland out so CR.CVE; to mum out beminto mismost the served he was indrawanted in colling to force because a to make the property of the place of the state of the solve of the spaces of SIZELOO ON THE TOTAL OF AN APPROPRIESTS, WHICH BE SIZELED BE SELECTED. all but consist a ar 25,157 and; pressure painted once remove and the buying wold two kypneritants as the hydrest theirs wenter, and ed borrows

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of merits filed by the defendant denied that the plaintiff was entitled to recover. I trial before the court and a jury resulted in a verdict against the defendant for 734.13. The desembent moved for a judgment notwithstanding the verdict as to each separate item, and in the alternative for a new trial. The court sustained the action as to the sale to the Gruver sanufacturing Company. Plaintiff thereupon remitted the sum of 37.05, and judgment was entered on the values of the verdict amounting to 387.08. This appeal followed.

At this time there are three items in dispute on such of which plaintiff claims that he is entitled to a courission of 10, of the sale price. It is unnecessary to consider the claim for commission on the 14 typerriters seld to the draver asnufacturing Company in the latter part of Movember, 1936, as plaintiff remitted the sum of 197.08, representing the commission on this transaction. and no cross errors are assigned, because of the action of the court in directing a verdict assinct plaintiff as to that item. The three items now in dispute on which plaintiff elains he is entitled to " commission are (1) the a typewriters sold to outlook Envelope Company in the latter mart of February, 1937; (3) 1 typewriter sold to George F. McKiernan in the early part of March, 1937. and (3) 100 typewriters sold to Sears Rosbuok & Company on July 6, 1937. It is conceded that plaintiff sold the typewriters to the Cutlook Invelope Company and deorge F. McKiernan. These typewriters were sold on a barter basis. Defendant maintains that at the time there sales were being considered, plaintiff submitted the barter propositions to its Chicago asles manager, who approved the sales on a borter besis on the condition that plaintiff would agree to a consission of only 5. instead of the usual 10%, and that plaintiff agreed to the reduced commission. In the trial plaintiff denied that there was any agreement whereby he agreed to waive the 10 commission. He was paid on a busis of 5, commission. The jury alloyed him an additional 5.

of earlies flied by the defendant conted that the claimitf we entitled to recover. A trial before the court and a jury required in a vordict egalact the defendant for 754.15. The defendant moved for a demont notalthetending the verdict as to such aspect to them, and in the element moving the next trial the matrices as to the drawn for the court succeins the retion to the drawn desired Company. Finishtiff therefore to the drawn demonstrate Company. Finishtiff therefore

to does no obugate at anoth could are arout out olds as .CI to notesiscoo o or baltitus at as sout amislo thisninis dolaw of the sale orios. It is unnecessary to consider the ciris for guitustefunce revers out at bion arctitus, ys bi out no nelvalment Company in the latter park of Movember, 1984, as plaintiff remitted and on the contract of the contract of the second of the second of and no orque errors are analyned, becouse of the settlen of the court nered sat .met deat of as this interest again a tore them. then now in discrete on which element of the as this to be the considers are (1) the 2 typertitors and to tution lavelage Company in the latter part of February, 188 ; (2) I typespiter sold to deerge F. MoRierman in the early part of wareh, 1987, and (T) 190 bypassithers and he mays harbons a Conjung on July W. 1969, 18 to ecological Scott of the crostiteson and bloe lititated fitt bebenoon onny and dearge I. Modiernan. These tyrowriters were sold on a borter basis. Ceresdant maintains that at the time there males your being considered, plaintiff outsitted the berter propositions to the Onioano asias manager, who approved the color on a berter basis on the condition that plaintiff rould agree to a commission of only 51 needed not at newton thirmson, rade has all laung not to national compacion. In the trial plaintiff denied that there was any acrossors whoreby he agreed to waive the 12 commission. He was rold on a basis of Sp commission. The just allowed als an eller, all in

commission, which omounted to 5.67 on the sale of 1 typespiter to deorge F. McKiernan, and all.28 on the 3 typespiters sold to the Cutlook invelope Company, or a total of 16.88. Obserby, the right to the commission on these two items presented a coestion as to the credibility of the mitnesses, which the jury resolved in favor of plaintiff, and we would not be justified in disturbing the verdict in that respect.

The chief controversy centers about the sale of the 100 typewriters to Bears Moebuck & Company on July 6. 1987. The net able erice was 6.102.00, which, if plaintiff's position is correct, would entitle him to a sommission of sale. To on this transaction. Merentant argues that the court erred in failing to direct a verdict in its favor and in "ailing to enter a judgment non obstants varedicto. Plaintiff insists that the record presents a curely factual situation which has been decided by the jury. In passing on a motion for a judgment non obstante weredicto on to direct a vardict as are not permitted to seigh the dvidence. If there is in the record any avidence from which, the jury sould, without acting unreasonably in the eye of the law, find that the material averments of the statement of claim have been proved, a verdict may not be directed, nor should the court enter a judgment non obstants veredicto. It is our duty to view the testimony in the most favorable light from the plaintiff's standpoint. Having these rules in mind, we turn to a consideration of the evidence. Flaintiff testified that he colled on Mr. Thomas, the buyer for Tears Roebuck & Jompany, about the middle of June, 1937, and selicited another order of 100 typewriters; that Thomas said "I would set an order for 100 a chines to be delivered in July, not before July. is to why he could not give me a written order before July lat, he said there was another appropriation or something, they couldn't buy any more - they couldn't take acceptance or any more machines until that month. I don't know the reason for it but I had to accent his word

commission, which enquired to 15.55 on the a six of I typewiter to decree V. McKiernan, and III.55 on the A typewriters will to the Cutlook Mavelope Common, or a total of 25.55. Weerly, the vight to the the consission on those two items prepented a succeisan as to the credibility of the mitnesses, which the jury resolved in fiver of plaintiff, and so would not be justified in disturbing the verdict in

The old to sies and Juede eradnes yeroverdnes Iside add transferre la ferre bareaux à fautair à lief & lieff, in not sele fiver , server of neither, e'Trinning 11 , deide , CO. 201, 30 acr esize entitle his to a commission of FGO. Co this transmitten. angula the ter court of milial at heart out of the court ataliarer assured not inambut a rates of mailie at the revel Plaintiff include that the record presents a surely decided without Plaintiff . Tot notion a me galance al . That and ye bebinsh and and notice juigment non spirate versions on the direct to vertice out to the permitted to coigh the evidence. If there is in the record any evidence from union, the jury could, without action unrescentify in the eye minio to deposite and to educatory laintee and that ball and and the have been proved, a verdict may not be directed, nor should the dourt enter a judgment non circum versione, it is our duty to view the .tulochance o'Tribule is west trail alderevit from and at quantitant Mering these rules in mind, we turn to a consideration of the evidence. Plaintiff tentified that he called on Mr. Thomas, the buyer for Sears SAFERED A. SERRARD .. SHOULD NOT ALCOHOL WE ALSO A STORY WILL SELECT SAFE ne see hive I" bise amon't find terestreet toll to rento redtons eviol wroted for . ylub at terretion ad of sentdeen Col wor rebre the on the could not give me a critten coder before July lat, he arid there were enother appropriation or constning, they couldn't buy any coal filtro emilitus tuta que se menerganas bias afrablicas quas - mesas hver ald seems of hed I ded it not nesser and word of such I . Adven

for it. I told him I was going on my vacation and I would see him after I came with from my vication." Itames further testified that the supervisor in the district assigned to him was Wr. Marold Muhn, who was his immediate superior; th t Mr. Thresher was the Chicago sales sensger: that he (plaintiff) salled on Throsher on June 17, 1987; that he told thrasher that he had an order for 100 anchines from me re Loebuck & Company: that he asked Thrasher for permission to go on his vication commencing on Friday, June 18, 1937, instend of Saturday; that Thrashor answered, "That is fine, ase;" that defendant paid him 175.00, being one week's salary due June 10, 1027, and two weeks in edvence covering the vecation period up to and including July 3, 1037; that Independence by fell on a Junity and was celebrated on the following may, and that, therefore, he did not come back to work until Tuesday. July 6. 1937; that shen he returned to work Thrusher told him he was going to change his contract and jut him to work as a junior calesman on a straight salary busis without consission: that he (plaintiff) informed Thracher that he had a commission coming for 100 machines which he had seld to bears weebuck A Company, and that he, the witness, refused to accept the change in his terms of employment; and that Thrasher then caused to be delivered to him a check for 183.00, less a deduction of 35 dents for social security tax, Witness further testified that on the same sorning, he cleared out his dosk and left. He stated that he arrived at defendant's office on the marning of July 6, 1937, at 9 o'clock; that Thrasher was "awfully busy" and "it was rather late when I got to talk to him." Cecil B. Thomas testified that in June and July, 1937, he was the buyer for lears Rosbuck & Company, and that the order for the 100 typewriters as bunded to the malesman. Mr. Thrusher testified for defendant that at his, ("itness's) request, plaintiff came to his office; that he saw plaintiff about June 18, 1937; that plaintiff was going on his vecation; that he informed plaintiff that he was making a change and that he mished plaintiff to work as a junior salessen on

for it. I teld bla I was going on my wantion out I would see his tout buildiest reducit security " moid for you more does much a radia the encertings in the district areigned to the see Mr. Hereld Money who was his immediate superior; the fr. Thresher one tas Chicago 1721 . The anul no sedecan' no balico (Trisaiula) and tent tronces solve mort continue CCI not value as hed ad toda tadacada blos ad toda of molivators tol reduced bears of fedt (passed) a housest arcol to be tracking demonstray, lone 18, 1472, inches on interest that Thresher ancreved, "That is dies, had; that distributed yold him (75.00, being owe reek's calery due June 13, 1977, end two reals in advance covering the vicetion period up to and including July 3, 1984; thet interpresence by fell on a Bucky and see onlarged on the following day, and that, therefore, he lid not ease brok to sense and restrict no note your class, on a restrict the sense thrusher told his he we going to chance his contract end put him to productions founds a female and trades related and related temples and an arrangement Surme nerselance a pey of 1 44 temperal permetar (Kitalela) of temp. for 100 mechines which he had sold to feare Headen a Company, and that he, the witness, refused to accept the enenge in his terms of s mid of herestrated at at heaven and reduced find the transpolate theok for (15.00), less a deduction of 25 dente for social security tax, Sue bernals of aguinges ame and that heldised westing, he cleared out his dock and left. He stated that he extined at detected to the such aid on the norming of July 8, 1886, at 8 a shoot; that threshow were "awfully busy" and "it are notion stell be talk to him." Geoil E. Thomas tostified that in June and July, 1837, he was the Suyer for Sears Rosbuck & Sampung, and that the order for the 100 not destrict records are communicated of belond one special-ways Astoniant that at him, (stanger; request, plaintiff case he his office; that he see plaintiff about June is, 1987; thet plaintiff was nation are ad test Trianista beardain of that he test he was making a change and that he sight flittiff to mark as a junior salesan on

a streight solary with no commission; that he was changing the position of plaintiff because plaintiff was not making enough soles; that he next saw plaintiff on July 8, 1837, at which time desintiff declined to accept the position of junior salesmen. He further testified that plaintiff then resigned, cleaned out his desk and left the premises.

At the time plaintiff ended on ar. Thomas of Bears Workley a Company, the latter did not place any order. Thomas informed plaintiff that as could not give him a written order before July 1st. as there was no appropriation for such purchases. The written instructions to the selessen, which were binding on plaintiff, state that contracts for future deliveries are not considered as orders and "will not be placed to the credit of the selecann on the books of the company." These instructions further specify that no commission will be payable on orders placed by the customer and accepted after the salesman has severed his connection with the cospany. The evidence shows that lears mosbuck & Commany did place an order with the defendent for 100 typewriters on July 8, 1837. The instructions to salesmen contemplates that orders shall be taken on forms furnished by defendant and that all sales orders must be approved by the manager, and also provides that when a concern of good financial standing issues its own purchase order forms, such purchase order will be sufficient. The record shows that fore Roebuck & Company delivered a written order to defendant on July 5, 1957. There was not then, and is not no, any question as to the good finencial standing of fears Restuck & Company. There was not then, nor is there now, any question as to the approval of the sale by the "manager" of defendant. It is obvious that defendant was anxious at all times to sell its product to same Roebuck & Company. The sale of the 100 typewriters, according to the testimony of plaintiff, was solicited by him before he left on his vacation. The sale took place in his territory, and if he was still in the employ of the defendent, he would be entitled to the commission of |610.20. According to the testimony of plaintiff he was in the employ of defendant on

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or the time plaintiff collect on it. There of here spokusi a Company, the letter did not place may erior. Thomas independ and this world rate nearling a min over ton bines od finit hidalely as there was no appropriation for outs produces to william sints , littledg no gathald ever daids , went les suit et enciterrient the restricted for future deliveries are not considered for transfer nds in place of a converse of the diless of to place of books of the ille asierieros on tras vicono reditut machentrai esodi ".vancmeo add ratto forgeon has remoters out of beauty arches so aldered ad regularion has account only of the animal property of the waves and property of the string there are about his proposed a familiar wheat fruit would defendent for 100 typestiters on July 8, 1887. The instructions to beginning early no note: of finds arbig that appropriate anneales by defendent and thet all sales eviews much his explored by seanger, and else provides that shou a concern of good financial nated the course of a continuous state of the course of the same of the same of the next to fine our ready field means handed our arguingly on this delivered a waither cross to defendent on July of 1987. where interest been and as noticed and no in at his and for ing of Seare Headenek & Company. There see not then, nor is there now, to "revenue as the expression in the sale by the "manager" of at abut its to collect to defaults but and who at it. . padowted COLDAND REAL PROPERTY AND ADDRESS OF THE PARTY AND ADDRESS OF THE LOSS OF befinite or a Tribuinia to quantized and of galbrases arethrough the high section and large annual expeditions. The course plant to his en it. .y, and if he was abill in the employ of the defendant, he .00.0100 to noteriamos and of beltitue of bluew recording to the

July 6, 1937. Plaintiff insists that he was said a salary until July 10. 137, and that, therefore, he as in the earley of defendant until July 10, 1937. It is undisputed, however, that on the serning of Tuesday, July 6, 1337, pleintiff coased to be a releasen for defendant. at that time he was offered a position as junior salesman on a different basis. He declined to accept the position. Thereupon be cent to his desk in defendant's office and removed his effects therefrom and left the presises. The relationship of employer and employee requires the consent of both parties. Therefore, it is manifest that plaintiff was not in the employ of the defendant from the time on the morning of July 6, 1937, when he resigned by refusing to accept the ner position offered to him. According to the instructions to salesmen. which were binding on plaintiff, he is not entitled to be credited with the commission unless the order for the 100 typewriters are place! by Sears Rocbuck & Company before plaintiff severed his connection with defendant. The record shows that the order by lears pebuok a Company as elected on July C. 1837, and that plaintiff severed his connection with defendant on the morning of July 4, 1977. Hence, there is nothing in the record to establish that the order for the typewriters was placed prior to the time that plaintiff resigned.

defendant urges that the court erred in giving to the jury instruction known as No. 3, reading as follows:

"The jury are further instructed by the court that if you believe from the evidence that plaintiff developed the order for the sale of 100 typewriters to dears meabuck a Commany by the defendant and that a id sale was the fruit of plaintiff's efforts, he is entitled to recover the commission on said sale."

This instruction ignored the defendant's written instructions to salesmen that they must obtain a written order in order to be entitled to a commission, and that a salesman who leaves the employ of defendant is not entitled to commissions on orders thereafter placed, even though he was instrumental in originally soliciting such orders. This instruction was clearly erroneous. Instruction ho. 4 reads:

"The jury are further instructed by the court that if you find from the evidence the sale of typewriters were made as alleged

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July E. 1974. Plantiff inclose that no wee raid a colory until July 10. 1327, and that, therefore, he was in the marley of defennes to maintee this no finit to mediagness, however, that on the arrival than until Tuesday, July 6, 1967, plaintiff occased to be a missagen for defendat. a no necessive values or notitions a here'll are ad mis teds th ad movement braise. We dealed to coment the register. morter intaited to sid become bus softe a declarate at dech at it of the and loft the granison. The colationable of employer and surlayer To the consent of kells and hard to the ford, it is need to and no suit end not the englar of the defenious from the time on the morning of July 6, 1937, then he resigned by reliving to second the new routton offered to him. According to the instructions to releasen. which were binding on alkinish, he is not entitled to be oredired teneft was everified the end and and and another endantement and Adde molivacous sin haraves Whitelias erelad yangua a dauget error yd with defendant. The senset shore that the sense by Lears manner of the Coronny an placed on July & 1887, and that placed his noncestion with lectential on the morning of July 1, 1887, there erefire to energy and the callest the order for the tyrene al was placed erior to the time that plantets regioned,

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This instruction ignored the defeadant a critica instructions to

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in the structed by the court int if you the court int if you the court sees and on alleged

in the constaint in accordings with the terms of the engloyment agreement of plaintiff, he is entitled to recover."

This instruction should not have been given. The have resentedly held that the court should not give a peremptory instruction to find for the plaintiff if the jury should find that he had proved his case as alleged in the declaration, and further, that it is the duty of the court to define the issues to the jury without referring them to the plaintings to ascert in that they are. (Bernier v. Illinois Dentral R. A. Go., 296 Ill. 464, 473.) The first instruction offered by the plaintiff reads:

"The court instructs the jury that if you believe from the evidence plaintiff was in the employ of the defendant on July 6, 1957, the day that the written order of wars toebuok a Company for 100 typewriters from the defendant was delivered, he is entitled to recover."

In the trial court there was no objection to the giving of this instruction. He objection thereto is voiced in this court. Apparently, the defendant recognized that the instruction stated the issue to be decided as to the 100 typewriters.

for the reasons stated the judgment of the Municipal Jourt of Chicago is reversed and the cause remanded with directions to enter a partial judgment on the verdict for the plaintiff and against the defendant in the sum of \$16.88, (based on the males of typewriters to the Outlook invelope Company and George F. McKiernan) and for a new trial in accordance with the views herein expressed as to the claim for commissions on the sale of the 100 typewriters by the defendant to Sears Roebuck & Company.

REVERSED AND REMARDED WITH DIRECTIONS.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

agracement is second use with the terms of the employees."

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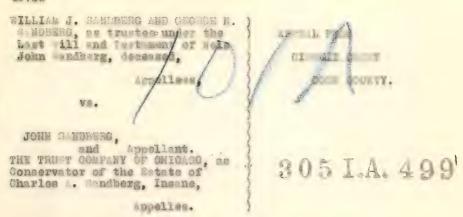
This instruction should not have been sived. We have recreedly held that the court should not give a percentery instruction to find for the the plantiff if the jury should find that the had groved his despect on a slieged in the declaration, and further, that it is the duty of the court to define the issues to the jury without referring them to the planting to secretain shot they are. (Service v. Illinois the shortest n. R. Co., 236 Ill. 484, 475.) The first instruction affered by the plaintiff reals:

In the trial court there were no cojection to the giving of this instruction. No objection thereto is voiced in this court. Apparently, the temperature the instruction stated the issue to be decided as to the IOO typescitars.

For the rescons chated the judgment of the Municipal Jourt of Chicogo is reversed and the crues resembled with directions to enter a partial judgment on the verdict for the plaintiff and spint the defendant in the sum of 515.85, (based on the seles of typesriters to the sum of sith the views hardle expressed so to the sistemant in the sith the views hardle expressed so the sistematics.

ADDITIONAL OFFI PERSONS OF TRAITES

THE R. P. LEWIS CO., LANSING MICH.



MR. JUSTICE HEBEL BELIVERED THE CVINIOR OF THE SCORT.

the plaintiffe filed their bill of complaint in Chancery in which they prayed that they be confirmed an trustees for certain real estate caned by Charles A. Bandberg, incompatent, suith said real estate had been devised to the said income marcon by in father, Hele John landberg, by his last will and towarder, fated Earch 23, 1014, from the fourth paragraph of which the following appears:

"Hourth: I hareby bequest to be insure son, herland and sells treet, and berg, my entire property on Carl and sells treet, nos. 1-7 are treet. I appoint my sons illies and George Trustees of this fund. The said runtus to se we without compensation or charge or other fees to be charged without consent of the hoirs."

and the said plaint ffs further proved for love to enter into a certain lesse with "ol Kegen for a period of twenty-five years at graduated rental of from \$1,500 to \$1,750 per year. Answers were filed by the defendant John . Tandberg, who is the heir of a id income person and the duly appointed Cuerdian at Liter for said the ries A. Indberg, incompetent. On earth 18, 1039, a decree was entered in the Circuit Court in force of the plaintiff share in the court found the insues for the plaintiffs and confirmed the plaintiffs as trustess of the rents, issues and profits of the real estate as devised to and owned by Charles A. andberg, incompetent. The decree further provided that The

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e perfects leade with 'ol Hegen for a period of tounty-ties posses on graduated special of from \$1,500 to \$1,750 per year. Answers come fill, by the defend folds. A conferry, who is the heir of a in terms person and the duly a reinted function of lines for mid therites A. Condborg, insuspectors. On earth 16, 1995, a derive mus subored in the Cincult facts in favor of the cinimal ties senses for the picture and ties senses for the picture and ties senses for the picture and their senses, issues and dear of the transport to the decree further respict that the decree further respict that the

Trust Company of Thick o, at on serv for of the Artito of Invites A. Sundberg, incompetent, be authorized to produce and enter into a losse with a id of Komen for a period of twenty-five years at the suid above mentioned figure, and the conserv for turn over the Pents, issues and profits the soft as received to these plaintiffs, as trustees.

The defendant John I. Isnobers contends that the direct Court had no jurisdiction to enter the order of April 11, 1838, removing John . Isnobers as suardian so lites and appointing 1. I. Libonati in his place, and that the court was without jurisdiction to enter the order in the cause after a notice of appeal had been filed in the lower court, as provided for by at tube. This provision appears in Ch. 110, Par. 200, Sec. 75, of the fractice let (III. law. "tots. 1939) in the second revision of the Act, where it is provided:

"(2) in appeal shall be deemed perfected such the nation of speal shall be filed in the lower court. After being duly perfected so appeal shall be dississed without office, and no step other than that by which the appeal is serfected shall be deemed jurisdictional."

This court in the case of Lovid Levi, Deceiver, Flaintiff in Error v. Charles a. Leadles, Cefendant in Error, 704 III. Apr. 534 passed upon a question similar in character to that is the instant

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The decree for twe proves the level of some provided the tree distinct of this cause to oppose the level soldettes the tree cated at this cause the pril 1, 1839, done . : anothery, individually, and so the tree than all litera for the rised at the constant, it constant, early attained in the appeal by filters his motion of oppose practice and another at the plaintiers, the court, or the lite dry of typis 1865, arter the sold notice a suppose had been filter, over the phisotics of sold done in the court, secured the original done of the original and the phisotics of sold done in the court of the original done of the sold done in the sold done of the sold one original and septendent in his piece and stond, we sold only of the John Court of the original and examples and stond, we sold only of the John Court of the original of the sold of the sold of the sold of the sold of the original of the sold of the sol

The definions John I. Temberg contends that then it would no justed the suter the enter the calor of love it, 1939, the fing John . It offers as partition of 1961, and envelocing director to enter the enter the enter a mation of the had been filed in the lower security of provide the total accordance in the lower security. The year file the

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case, where the trial court removed a receiver, the plaintiff is error, and appointed the des neigh in error as receiver, unen the giving and appeared of a bond, to act in his place. The appellate Court in that case said:

The critical question in the case is whether on July 3, 1915, when the instant case was instituted in the Municipal Court, the alcintiff in error was entitled to sue as receiver. The final decree, in the case in which plaintiff in error was receiver, was entered in the Circuit Court on April 3, 1915. An appeal was taken from that decree to this court on May 8, 1915, and the appeal bond filed in the Circuit Court on May 8, 1915. On June 5, 1915, month after the appeal was perfected, the Circuit Court entered its order providing for the removal of the receiver upon the approval and filing of a 112,000 bend by the defendant in error. And bend was approved on July 14, 1915, and filed on July 17, 1915. It follows, therefore, that the appeal from the final decree in the Circuit Court to this court had been perfected before the order of the circuit out for the removal of the receiver

It is the las 'that a perfected appeal operates to stay any further proceedings by the court rendering the judgment or decree appealed from.' The People v. Fam. 778 Ill. 181; In arts Thatcher, 7 Ill. (S dim)187; Isan v. Isan, 183 Ill. 180; Jonkins v. Jenkins, 31 Ill. 187."

The rule of less that applies is that proving for and perfecting an appeal during the pendency of a motion to vecate the judgment spices the sotion and deprives the trial court of jurisdiction to enter any order thereos, and the appeal is therefore from a final judgment notatibet and in the condency of such motion.

helow v. Acms Printing Co., 278 Ill. 276.

the plaintiffe reply to defendant's contention that the direct fourt had no jurisdiction to enter the order of Anxil 11, 1839, removing John . Andbers as suardian ad liter and appointing . B. Libonati in his place by stating that the court within thirty days from the entry of the decree in question entered this order, and under the statute it was within the period allowed the court to exact or otherwise enter such order within the thirty day limit after the entry of the jud cent or decree. This, however, is not an answer to the question that by the service of notice of

ence, there the tries court removed a receiver, the electricity in eros, and speciated the defendent in eros on receiver, quen the civin and appeared of a bond, so all its bines. The isonlinks fourt in that one ordinal

an andrew it goes eig al mering to whether an to the the one one of the three was the three was an allegate in order was an allegate of the case of the three of the three t ฐนิจที่สำหรับ - ว แบบของ หนา ขนางกลางกุ และแก้ หนา สา เกาะเก our offered in the Circuit fourt on april 2, 1011. funce filed as percent field most medic are line on New York and the second band filed to the Ottom Ottom St. 1921, a Avenues and not unlikeway rates all breadon Pausi n to nutlet has Investors outs most unvice fact tell .verse at inchattes . and to return out and or construct I'm taviouer aid to irronan adi tot ADDRESS OF THE PARTY NAMED IN of historica process construct a built and our at the REPORT PRODUCT OF STATES THE PARTY AND ADDRESS OF THE PARTY ADDRESS OF THE PARTY ADDRESS OF THE PARTY AND ADDRESS OF THE PARTY AND ADDRESS OF THE the periods or come equal trans. Daling (a contract of the state of the

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shich we have musted provides that no appeal shall be dissisted without matice, and me step other than that by which the appeal is prefected shall be deemed jurisdictional. He are of the common that under the provision of the statute ruoted, the appeal was perfected, but the plaintiffs still urgs that the order in massion are entered before a supersedess bond was signed by the defendant and approved by the court. Thile it is true that in order to stop operation of the judgment or decree a su createss must be a noted and bond signed, still that does not affect a decree here an appeal has been taken, as was ione in the instant case. This is not out by the provision of Fig. 206, see 33, Un. 110 of the Civil Practice Act, where it is provided, in part:

"An appeal to the Appellate or Supreme Court shall operate as a supersedess only if and when the appellant, after notice duly served, whell live and file a bond in a reasonable assume to accure the adverse party."

was taken but no supercedens are created until the court ordered that a supercedens be granted upon the execution by the derendent of a bond, which are after the date when the erder in question was entered. As appeal may be availed of even though a supercedens may not be granted, and if that is so it would seem that the court would be eithout jurisdiction to remove the marries who are appealing, about the sotion of one of the adverse marties. In doing so the court would be depriving the party litigant of the right to appeal, as provided for by law, and since the appeal was sending the court erred in entertaining the motion to remove the defindant John . Tenfore as furnishing ad litem of Charles as andrews, non compose mentis.

The defendant contends that the Circuit Court had no jurisdiction to consider the complaint filed by the plaintiffs or rent repeat by the defendant an appeal was savineded, and the restrict which we have mosted appropriate that an appeal shall be dissioned alaborate sound as the object by which the appeal shall be demed jurishichteuri. We are at the maining that under the provision of the salication and the constal, the constal was partected, but the electric still ungo that the error of the constant of the constant of the constant and approved by the constant and approved by the constant and approved by the constant or desire in the electric still out the first that the decreasing and bond algorith that the first that affect a decreasing an appeal has been taken, as the dead and the inclint case. This is not out by the provise of the constant of the particle of the provise to the constant out by the provise to the constant out by the provise the provise the stant and out by the provise to the provise the stant out by the provise to the provise that is not out by the provise to the provise the provise that is a provised, the provise the provise that is

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the relief proped for, and urges that it is essential in the creation of a testamentary trust that the testator adequately indicate by the terms of his will his intention to create such a trust by using lammage sufficient to sever the logal from the equitable satate, and with such certainty as to identify the beneficiaries of the property out of which the trust is to take affect.

will and testement of hele John Landberg, deceased, we find the will provides that the testator conveyed to his insens son, Charles A. Bendberg, his entire property on Carl and Belle Treet, Ess.

1-7 Carl Street, in Chicago, and then provides that the testator's sons William and George are to be the trustees of the income which is received from the building and land in question.

While it is true that this prevision does not set forth in much detail the purposes of this provision, it is apparent that the testator wished that his incane son should receive the property in question and that the funds derived from this property were to be used for the benefit of this son, and that this fund wasto be administered by his sons who are named trustees of this fund.

The court, in the consideration of this question, provided by the decree which was entered that the frust Company of Thicago, as conservator of the state of Charles A. Sandberg, incompetent, and as such the owner of the fee, proceed to produce the proper authorization to enter into and execute a lease with foll Kegen upon the aforesaid rental terms provided for by this proposed lease. The proposed lease provides that \$1500 per year is to be paid for the first five years; \$1600 per year for the second five years; \$1600 per year for the fourth five years, and \$1750 per year for the last five years, and it must be considered that by the entry of the decree the court approved of the terms of this lease, for it is further provided

the rolles propos for, and urgae that the encountif in the orestable of a testematicity from that the the testematicity from the testematicity is a testematicity from the intention to recent much a truet by using language sufficient to rever the lastic from the equitable satisfic, and with such destribly as to identify the coultable satisfic, and with such destribly as to identify the first first of the truet is to tries.

When we come to concider the Fourth Personsh or the lost will and tenderent of help dobn Camberry, decrees, we sind the will provides that the test der conveyed to his in mass con, (burles i. Sauthery, his entire promety on tark and Weile Threst, No., 1-7 fard Street, in Chieve, and then anestice the time testatories one William and George one to be the truckess of the income which is received from to building and land is cumbian.

While it is true fort this provision does not set forth in much detail the purposes of this provision, it is apparent that the tentetor victor that his tenne one chould receive the prenorty in cusation and that the funds derived from this property ears to be used for the barefit of this some that this first that that this provision has the season to the first that this season to the season t

The semble in the consideration of this cucation, provided by the decree which we entered that the frust to according this year of the frust in according to this year of the rank of the constant, income the proper that a manh the center into and cascade a lone with the proper the the cascade to accord to a proper the the properties to make the third proposed lease. The proposed incus provides that liftly yet year in to be yeld for the first time far the first years; the first time second live years; the first time far the first years; the first time far the first years; the mast be considered that by the entry of the decree the constant and the terms of this lease, for its surther previded

that the Trust Company of Chicago as conservator of the state
of Charles A. andbers, incompatent, upon receipt of the said
rentals is to turn over the fund to Milliam J. andberg and
George . Mandberg, as trustees under the last will and testament
of Mels John Sandberg, deceased.

It was the intention of the testator in the execution of this last will and testament to provide a fund to be used for the benefit of Charles A. Sandberg, incompetent, and that, in a measure, is indicated by the fact that the two some who are to act in the distribution of the fund are not to receive any pay or remuneration for their services.

The general rule is that the words "trust" and trustess," are effective in creating a trust but are not necessary. If the will by its terms as a whole shows a purpose of creating a trust, though no special words are used, it is sufficient, and if it clearly appears from the terms of the document that it was the intention of the testator to create a trust for a lawful purpose and for the management of the estate, such purpose will be approved by the courts.

One of the cases cited in support of this contintion is Timbush v. Timbush. 253 Ill. 407, where the morems court held that even though the first paragraph of a will, standing alone, vests the widow with an absolute fee, yet if a subsequent paragraph clearly shows that the testator's intention was to create a trust estate for the benefit of the widow and his children, including those of a former wife, the will should be construed as creating such trust estate and not as giving the widow an absolute fee.

character of the improvement, we find this:

"The court further finds that by reason of the rold and extensive growth of the City of Chicago, the change in the character of the neighborhood, and that the building now upon said president has become an undesirable type of building, and that the physical property itself is in a

ting the frust There by or Tuinses as consempted of the Lettic of the Lettic of the radiant, uses receipt of the cult rentals is to ture over the feat to tillies for waiters and testings for Saniters, as trucked asfor the Last will ead testionally of felts folk folk deathers; it seemed.

It me the intention of the Sectator in the execution of
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are effective in amedian a tract but see not necessary. If the vill by its terms as a back some a marpose of erecting a tract, will by its terms as a back of the document that it was the traction of the technique of the technique of the securement of the oration and the securement of the oration and the secures will be approved by the courte.

that even though the first passions of a alli, attaching alone,

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fresh obserly sives that the testator's intention one to see in a sunt such assets a figure extent of the vides one his children, included in the testat, the alli should be construed as exerticy.

then we consider the finite,s of the court won the

Adopt and to nement of most where toolfier region will consider with regions with the utility out to diverse ordered has been been and the telephone and the telephone and the telephone and as to make a subject of the property of the state of the state

dilamidated as run down condition now accupied by a class of t mante who are unable to may substantial rents, has become unproductive, and the not income has disinished repidly; that the gross income for the year ending July 1, 1038, assumed to 1,300, and the not income 577.70.

Then the court, as we have already indicate in this opinion,

found the rant 1 to be received for a ch of the years during the

continuance of the term to be fair and responshie and to the best

interest of the estate of harles and being, incompetent. It

is to be noted that in the decree the court retained jurisdiction

for the surpose of administering the aforeseid trust setate.

Under the circumstances so they appear from this record, the court did not orr in entering the decree in quantion.

Other questions have been rised, but we do not consider them important, and for the resons states, the decree in filtrasi in part and reversed in part.

DECREE AFFIRMSD IN PART AND REVISIND IN PART.

DENIS & SULLIVAN P. J. CONGUAS BUCKE, J. SPECIALLY CONGURSING:

I agree that the dec me should be affirmed. I am of the spinlen, however, that he commediar had the right to recove the person then acting as quardian ad lites and is appoint a success or quardian ad lites in his stead. Furthernore, the chancellor could act until the supersedent bend are filed. It will be remembered also that the notice of appeal does not (and, of course, could not) assi n error as to the removal of the quardian appearantly, there was no appeal from the order removal of the quardian. Hence, the former quardian ad lites is in no position to assign or arous any errors have. The cause he relies of an appeal (as distinguished from a crit of error) was dependent on the approxil of a lond within the time limited. Then the case was in the same continues if a supersedent had been arented. Under the ald practice where the livingent sued out a writ of error, he was not

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Vales that chrometrates on they opened then rich monering the court all not are in cutaries the decree in cutaries.

Other restless have been misself out as is not condition in formation in the stringer.

If the defends and for this recent errors of the decree is attirmed.

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Legres that the decree within a discreption of the religion. I me of the ephalos, because, the soles entitles a different of the religion of the second second to evaluate a the parties of the parties of the second. The second second

required to file a Lond unless he saw ht superseless. Unler the writ of error protice where no superesdone was arented, the trial court could suforce the decree or judgment. Now, however, under cotion 74 of the 'ivil retic tet, orders, jud cents and decress in civil cases that are formerly reviewble by writ of error or ap ... I. are subject to review by notice of apocal. uch review is designated an appeal and constitute a continuation of the proceding in the court below. Woh appellanter the Cavil Fractice Act presents to the reviewing court il is wes which formerly were presented by a col and orit of error. In considering eases that are ofted and which arose unfar the old Proctice Act, there distinctions must be kept in mind. Until a supersedese bond is siled, the trial court has a right on a proper showing, within the torm, to weste or odify ite orders, just take and decrees. Wen if as consider the point as properly related, the record does not show that the engestler abused his discretion. The decree provided that the Circuit Court rathin jurisdiction to approve the lease and to administer the trut cottee. Ther fort, in any event, the jurisdiction of the Circuit Court over the subjest matter and the parties, continued.

required to file a tool walnes be south a empriseders, Under the wait of erver processes on emporements and povered, the trial mours could enforce its decree or judgment. Low, housers. mader Testion 74 of the Civil Provides Let, spires, int mante 'at To thin of althousever afromuch even hold seems five at average error or arread, are subject to rotter by antice of energ. uch selfunditues a sefutionne has finne de heineries al welver add tolar freeze day .weled turne add al path seeing add to Civil Fractice Lot presents to the reviseing court 41 lacuna which formowly were exceeded by an east or area. The first of error. his not value union deals has belied one half sense polyhelment e fitth . fain al tend of down wastforthalk anoth, to a colfart or is no filled a med frame faired and about another more charter, within the term, to record or notify the orders, full most and decrease. Even if a counties the paint as properly roles, the record does not show that the circulation absent bis discretion. The decree provided to t the direct tour retain jurisdiction to approve the lease and to administer the trut earets. Ther fore, win any event, the jurisdistion of the Direct Court was the misfeet metter and the artice, comminced.

40804

REAL PACKING CO., a corporation,

A Intiff- prolleg

CIRCUIT COURT

REO PACKING GO., Corneration, et al.

efendents-Appellants.

COOK COUNTY.

305 I.A. 499°

MR. JUSTICE HEARL DELIVERED THE CRIMICS OF THE COURT.

County by the heal recking Commany, a corporation, against the mee facking commany, a corporation, and to Coccule, its resident, seeking to enjoin certain alleged acts of trade-mark and trade name infrincement and of alleged until transmissions—competition and for an accounting of the alleged damages and prefits arising therefrom. The case was heard by a matter in chancery to whom the cause was referred by the court, so found for the alling. Objections to his report were filed, everywhed and steed as exceptions, and the trial court upheld the laster and entered a decree as prayed for in the complaint, from which decree the defendants have perfected this appeal.

The facts as they appear in the record are that the plaintiff, he il rackin feathany, is an Illinois corporation, ongaged in the manufacture and sale of frankfurters and other most
products throughout thicase and its suburbs. The definitions are
nee facting Comp my, an Illinois expertion, similarly engaged, and a. C. feezule, its fresident. Both companies about
large sums in advertising, and in some places, such as outh
Chicago, Chicago Reights and Acceptill, are competitors. There is
a brief outline of the historic background of the two companies,
and from the briefs it appears that about the year 1970, the
Real susage Company (not the plaintiff here) was eramised by

205 I.A. 499

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con freils to it it it enorthed courses, and the source the intitio on trains the course of the course of the course of the course of the entry of the course of

The folia is they speed in the restrict of the the plaintiff, bed inclined an illinois correction, one plaintiff, bed in the enumber of the stitutions of the stitution of the state of

about the year 1932, Real Sausage Company went into bankruptey and certain of its agents were sold to the Weel Jacking Company, the plaintiff in the present procediage. Following this bankruptey and sale, . . . locally was no least an account at ith it or its succes or but continued to sparate a private meat route as he had been doing for about twenty years, colling his products in similar boxes with versillien printing with the words "heal and Tasty," and his own initials "N. C. P. W. C. Foguly testified that about May 1937 he turned over his own acusage business to see Pockin Company, the other defendant in these proceedings, which he had previously organized and in which he had a controlling interest; that the letters" stood for Metallars' Muslity Organization, and its trade-mark was also resistered with the "coretary of it to of Illinois and contained the words "let blare" Southy Organization, dec making to." In the latter mart of 1055 and the early months of 1957, the defendant used a con or container which was introduced in evidence at the trial as an exhibit.

The subject of this controversy is whether there was an imitation of the next hat was used by the plaintiff as a con-

Virians and derive, who are for any grain in according to an inclusion in the security of a contract in the contract of a cival and its contract in the contract of a cival and its contract in the contract of a cival and also the contract of a cival and and the contract in the cival and according to the contract of the contract and according to the contract and according to the contract and according to the contract and according to the contract and and the contract and according to the contract.

that the ground speed I set , that care that meet telegral from the real place week release and to minima her gol present towers, the of latte is the present prouding. Islander this but to the content of the pale of the pale of the title after them ad the a attract of An alters but management of the afrom the had been doing too short to make politic the country has Last' sire and this contains assistantly after some tallais at There, " and his orn initials "U. . . " " . . . seeming to timed that about May 1987 he termed eyer his som town a business to has foliar (month access or in at the tell makes off quarte) juident end militerranes of his delich at the factories planelyees had ad pilling bendings on how to be a benefit of but for Organization, and the trade-are and also recipions with the "tradi soll this was trainers for elemifile and "to graduous" to from world sir mi F.s | colden | ps. | nolden | programme | lors and the morely moutin of ligh, the defendent word a ton an The set fairer self or complete at bosomerhal now defile while how

and president or the community of the section of the community or a normal

tringr for its food graduate, and it appears that in have been 1836, plantist's attorneys wrote to the day ckin foresty to desist using the tr de-carby and trade arms of " gal" and the design on the packing boxes. The use then advised the plaintiff that it had two months' supply of bores on hand and that it would not imitate the label, trade-mark, desira and form of advertising being used by the ministing abscrashtly, on December 19th and 24th similar letters were sent to dee by the plaintiff, in which the attention of the defundant, Heo . seking Company, was called to the use by the defendant of the trademark and trade name "heal" and the design on the packin name that were used by the plaintiff in this action. On Josepher 7, 1937, these proceedings were instituted by the plaintiff, which sought an injunction and an accounting of profits and dam were As we have already indicated, the matter was heard by a mater in chancery, and the trial court upheld the report of the .. star and entered the decree from which this amount are taken.

was taken. The testimony relating to the historic background of the two companies is set forth above and will not be further reviewed here. The testimony relating to substruent event is reviewed here, not with reference to its order of presentation, but with reference to the chronological sequence of the events thereby related.

The court in its decree perpetually enjoined the defendants from the use of the words "heal Prohifurters" and "heal Packing Commany," apparently upon the basic presses, which the defendants state they will subsequently show is contrary to the authorities, that the plaintiff had secured some sort of an axelusive
right to the use of the descriptive word "heal," and the defendants cite in support of their theory the case of Candes, and i dev. Hears & Co., 54 Ill. 439. The plaintiff, Decre & Co.,

tions for the real products, and the experts that in enventure, or games' united out of a dear to provide a "thirties and a state of the leading and the state of the state o adi ben "lee" " to and abres in grou-sterf add reits deles deles doalen on the marking bores. The too then divised the claimets the feet has band so perol to plocus federas out had the turb would not interta the label, trade-more, design and from at the verthear being used by the claiming. Foregueing, on Repender little and fitte winiter letters sent to Lee by the plaintiff, in skick the ettention of the defeniest, Dec meting -ohref and be an burtak and and and at halles and . Thereto. regard patitions and no evince such that "Iron" sweet sheet her from that were used by the risistiff in whis notion. On "number ", 1927, these precedings and inclituted by the printiff, which . serve b has estiver to unitar out as has authorized as frauce to the serious all and to fine meritar our heard by a market redr m and to decree and finder towns Isias wit has premumin mi and entered the deques from which this appeal and beaute has

is the larger before the consider solution of a coston by solution was taken. The the the testing a constant to the interest before and sixtering to companies to account the two companies to the testing to account are in the reviewed here, and with reference to its order of exemption, but eith reference to the entence of exemption but eith reference to the chrosologies? Remarks of the error o

The court in the decree respectability end the defendonts from the cas of the certs "Seel Irchiteriess" and "Seel Protine Commany," apparently upon the basis preside, which the derenents state they will addressingly ober in contrary to the cuttorients to the upon of the descriptive merá "Leel," and the defendents site in support of their theory the case of Seeder, Inn Air

had for some eighteen ye ra, manufactured and mold pleas which it had stanciled on the handles "leave 4 00." in a circular line, with "woline, Illinois" stanciled undernested in a straight line. It had also devertised its plous by circular, catalogue, etc. for many years as the "Noline slow". It the trial the court entered a decree finding for the plaintiffs and that the plaintiffs were entitled to the exclusive use, as a trace-ork, in the manufacture and sale of plous, of the cords "Valine low," together with other characters and figures which the court held were used by the plaintiff in its business.

The upreme fourt in its opinion written by ar. Justice breeze, reversed the decre dissolving the injunction and dismissing the suit, and in specking of the right to use words, marks or other devices, the court interpreting the words to a security used, said:

"There is, obviously, no good reason why one person should have any better right to use them than another. They may be used by many if arent persons, at the ame time, in their brands, marks or labels on their respective goods, with perfect truth and fairness. They simily nothin, when firly interpreted, by high any dealer in a similar article sould be defrauded."

and the derend ats upon this general custion site the same of Bolancer v. Peterson, 136 Ill. 315.

The plaintiff's reply to the contention of the defendants is that defendants argument is apparently based upon the theory that if defendants can clock themselves with the subterfuce of a phrase known as "descriptive words," they will be free to surge in any and all acts of imitation and unfair competition and plaintiff is sithout a remady to protect itself from the unfair protice of these defendants. Ind further asserting call this Jourt's attention to the position assumed by the defendants as being controlled to the sutherities applies ble to the case at bar, for under the law and under the facts the plaintiff has the Fight to have its name and label protected from the imitation and unfair competition

ind for none of when years, associated an edd plous which ind at modice the bar acte to the brailed and the form the context in a statistic line, with "soline, Illianis" chanciled antennest in a statistic line. It inches also when the place by circular, artain was, stated as for the "Foline Plot", at the ruled the search water and the pinter with a decree tinting for the also the first inches when a the craft is relative use, as a track of the craft has the court to the acute the search with allow of the craft of the court had the sourt had t

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anths or other devices, the sourt interpreties the verse that sere

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The plaintiff's seply to the contention of the defenints is to the their defening and the their is the their defening and a separately bess upon the theory of a their if felenings on a florestation and show which the subtestate of a separation and all sets of leitetic and unfits competition and plainting and all sets of leitetic and unfits competition and plainting a singular a sensity to explore an autility for the unfits provies of these the unfits provies of these the unfits provies the their definition and their their selections and the the sets of the the short of the sets and and a the facts the plaintiff has the stylet to have its the law and ander the roots the plaintiff has the stylet to have its mades and laked protected the initiation and unfait competition and unfait competition

of these defendants, and cites the case of O'Caper Larg. T. 43
Kreege Co., 259 Ill. app. 396, where this court said:

"Moreover, even if the words could properly be considered as as descriptive, that fact would not justify the decentive use by ethers of the orde, or initer was:
in unfile true commetition where confusion in the interpretation of the order o and the articles of his manufacture, another will not be permitted to use the ross ark, word or phrase as a to lead pure moors to believe they are buying the goods of the former. This rule a lise even though the word, home or purses under which the remistion of the sereight or manufacturer has been accuired in the mer ly de criptive of the character or quality of the articles " " ". The aucetian is one of common homesty, and the courts require the observance of such a standard as will protect the businesa, the market and the reputation of a dealer against *11 acts which tend to depairs the public into beliving that the goods of another are his goods and to case them off A merely descriptive term * * * may have become so sa ociated with a particular kind of come or the product of a particular menufacturer in such a way that merely attrohing the word to see orticle of the size that so id amount to a misrepresentation as to the origin of the article. 's

the defendants concede that the case "seal is used to denote the particular fronkurters of this complainant: one that the defendants further concede that plaintiff has used the name "Real" continuously for a period of sore than numerous years to identify its products, and that this name has become so attacked to the goods of the plaintiff that when the name "seal" is applied the goods are identified as the products of the plaintiff, and that the defendants further concede the following to be true in their answer to the plaintiff:

[&]quot;(8) That by remen of the ion experience and rest care of the plaintiff in its sold business, and the good quality of a id 'heal Frankfurters' and 'heal Jausanes,' the same have become widely known in the community; " " " and that sold product has consider high reputation " " "

[&]quot;(7) That said product is known to the public and to the buyers and consumers thereof, by the names of

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and it appears from the out coling offered by the of artifff. This the definitive is and the first that the considerate considerate and the first the profiterior from the set the considerate; this profite is a nerical of the set the nimeter, and their this need the head of the first that the collection of the first that when the news "Leaf" to the goods of the night that the collection of the first that when the name "Leaf", and that the goods are the profite to the thinking of the plaintiff, and that the defender of the thinking as the raws in their

The state of the s

⁷⁾ That sold croduct is those to the public and the buyers and consumers thereof, by the names of

'Real Frankfurters' and 'Real Sausages', and by the plaintiff's are proser considered, indeed, transcript with the same of the ded."

So that it would seem, in a measure, that the defendants have admitted the use by the plaintiff of the words that are the subject of this sentreversy, and further, in the case of International Germittee of Texas open's Christian Assa. v. Young Fomen's Christian Assa. v. Young Fomen's Christian Assa. v. Young Fomen's Christian Assa.

"hile it is true that constict terms or more testinative words are the comment property of the muchlo and not ordinarily susceptible of appropriation by an individual, that fact will not prevent the issuin of an injunction to restrain the use of such terms and words at the muit of one who has already adopted them, where the evidence shows a frequent design and that the public will be misled."

The Court's attention has been called to the opinion of the Supreme Court in the case of The sount Rose Cemetery Agen. v.

The New Mount Rose Cemetery Agen. 248 Ill. 418, wherein the court approved an injunction to restrain the defand at free using the name "The New Mount Rope Cemetery Association," the same infringing upon the name of "The Hount Rope Cemetery Association." and in the case of Aute Parts Company v. Hilverstein, et al., Ill Ill. App. 436, this sourt held the name Lute Parts and Illes Company to constitute unfair competition to the complainant Auto Parts Company, although both names are purely descriptive. There the court said:

" hile names which are generic terms or merely descriptive are the common property of the public, and a private property interest therein cannot be acquired, nevertheless, the courts will grant relief where a name of this kind has been adopted under electroness which make it spear not the purpose of adopting such name was to wisled the saeral public. International on N. C. a. v. Y. 194 Iil. 194, The Fount Reps Commetery Asan. v. the day leant Rope Commetery Asan. The Ill. 416. One cannot use even his own mass in such a manner as to dessive. Allegant to the later the college of the cannot use even his own mass in such a manner as to dessive.

The rule is that generic terms or descriptive words are the common property of the public. Nevertheless, where the common descriptive words are used and are adopted to misless the general public and such appears from the suidence, the court

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common property of the cubits. Nevertheless, where the peneric

would be jurified in entering in order restraints the defead at in a proper case from using the words that are peneral in an external used for the purpose of deceiving the public.

There is a further case that has a bearing upon the cuestion before this court, and that is the east of part that forder remonny v. Raymond, 70 Fed. 376. The court in affirming the order enjoining the defendant from using the sord "by 1" said:

"The word 'Royal' is not descriptive of baking powder. " I id word is, in fact, used as a mark to indicate the origin of the code ands by this complain mt."

and when we come to consider the authorities, as sell as the character of the conds used, we are of the crimion that the court did not err in enterior the decree, where it are for the curcose of protecting the Real Facking to many from initiation and silful acts of unfair competition by these defendants. The question is largely dependent upon the purcose for which these ords were used.

It is the contention of the defendants that in the case at bor the defendants had in good frith irrevocably abandoned the use of the source container known as claimtler's which the long before suit are brought and had been distribution its producte exclusively in its green and white cherry brand box.

this exhibit was used only in connection with the sale of sources from sesetime in the latter part of 1836 up notil way, 1017, when the green and white cherry brend box came out, which ab adoment occurred approximately six menths before these proceedings are instituted in December 1837. However, it appears from the evidence of the plaintly that notwithstanding this preside the defendants continued to sell frankfurters under the simulated latel - claiming this by the defendants.

would be justified in exterior as erder recoverings the defendant in a groper access the needs that one convert in discovers and needs that need for the surpass of descript the midlig.

There is a further once that imp a bearing most the muse the muse them before this enurging the time once of invited in attituding to the court in attituding the court in attitude the court in attitude the court in attitude to the court

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And then we come to consider the outlorisies, or sell on the side out out for the currons the out out it was for the currons the outlood intention and wilted of protection the Seal Packing Commany from initation and wilted for protection and wilted agree.

It is the confuntion of the defeatants in the cuse of the fee the the cuse of the fee the street of the feet the feet the feet the feet the feet of the feet of the feet of the products of the products of the feet of the fe

ividence was allered by the definition in the affect that bein equilibrity of any and the state of any this equilibries and the mass of any from seating in the levier part of 1836 up until lay, 1817, when the green and white cherry broad best come out, which abandoness the finit state hatchers this aremies the Arfordants.

sold a che par crude of it akfurters under the lait; tion 1 bell of the plaintiff. There is also evidence that is however and becamber, 1937 a situant one frontfurters being cold in the retail stores under the imitation likel of the quaintiff, and the situant testified that he saw at the Reo Packing Company about 50 boxes already macked on top of the racks in the spoles; that these frenkfurters were 15 cents a sound, thile the better grade as:

19 cents a pound, and there is also the admission by the defaultants that on or about November 37, 1937, the New Lacking Company was using the plaintiff's label.

to enjoin the defendance from further acts of unvil committion, and there is evidence that subscruently in Tebruary 25, 1930 the imitation label of the laintiff are now in ratial average. The defendant, a. C. committee, testified that they conseducing the box about the end of March, 1938, because is attorney had made an agreement with the attorney for the plaintiff to that effect.

presented by both sides it appears that the cuestion is a controverted one and that there was sufficient evidence to justify the court in entering the decree in question.

There was evidence as to whether or not the names Real and her were confusin. That also was a question of fact, together with the question as to how the mail was tract do her
it was misdirected to the defendance. Taking the case of in
all the evidence upon which the court passed was cufficient to
sustain the decree upon that question.

The plaintiff suggests with somewhat surprise as to the defendants' contention, which is raised for the first time in this court, that the swidence discloses an abandonment of plaintiff's label, and calls this Court's attention to the fact

and a charges areas of irraiturees union the imitation label of the elements. Near is also estimate that in appealed and december, little a citares was freehing-tone being and the partitures the district of the plaintiff, and the vitness at the plaintiff, and the vitness terminal that he see at the now lacking bospery short CD tores from this he see at the new countries the bester great una freehomes were 15 seets a pound, while the backer great una 17 seets a pound, and there is also the minister in by the defendance of the pound of the pound have the lace of maximum to pay and account to year.

to emplois the defendants from farther mete of enthis committies, and there is evidence that emicesmently do February 15, 1955 the initiation in the contest was soon in retail everse. The defendant, . . . Topyolp, to tified that they corned wing the bur they come the estimation at the contest the contest

e, when so corrider wit the evidence that has been prescribed in a conprescribed by both sides it epoch so that the question is a controverted one sum thus there was autriciant evidence to justify the count in extering the deerso in question.

there was evidence as to election or and the c.mes Herl and Ese erro contact the Charles and also man a receiped of front, the creation as to now the soil was trouted in hou diture the ones il in all the criteries upon which the court parent was sufficient to

tion, which is raised for the first time in

that there is no evidence in the record upon that question.

The answer to that is, the defendants did state in their briefs that there are an abandonpent, which is in effect an admission that they had been using the disinting's label, so that as an gather from the record, the defendants seek to avoid the decree that are entered in this case by the statement that they really had abandoned the use of the label. However, there is widence that the defendants continued to use it. That is even identical by the defendant of the manual that suggestion, except to point to the record.

Under the circumstances the plaintiff is entitled to an accounting of profits and damages, if any, arising out of the imitation of its label by the derendants, and it was for the court to determine the question from the frosts, solid it did and directed that an accounting of profits and damages be turn, and nothing has been called to our attention which sould justify a reversal of the decree upon that ground.

For the reasons stated in the opinion the decree is affirmed.

DECREE AFFIRMED.

DENIS E. SULLIVAE, P. J. BURKE, J. CONCUR. The interest is then to, the destend and dies in the proposed of a control being the trained that there are no standard and the in attack on chairs brief that they had been andry the plaintitte label, on that we are abled the read the plaintitte label, on that we are abled from the read of the second of the second of the read and the first one of the label, the read that they really bed abundanced the new of the label, there are the extract to artiface that the defendance to are the traintitles that the defendance are the second to are is. That is even abultant by the the defendance the read and the feat the second that the reader the paint to the reader.

Under the electronsinger the plaintiff is splitled to an accountie, of arctic and democes, if any, existing out of the latitation of the latitudes, and it was for the court to detecting the obscript from the frets, which is did and directed fint an accounting of profits and decayes be tile, well and ground.

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PEOPLE OF THE STATE OF

CLARENCE WALKER,

TAL FROM MUNICIPAL COURT OF CHICAGO Appellant. 305 I.A. 500

MR. JUSTICE MEBEL DELIVERED THE OFINION OF THE COURT.

This appeal by the defendant is from a judgment of guilty in a criminal action, wherein on June 10, 1939, an information was filed in the office of the elerk of the Sunitival Court of the City of Chicago. signed by one, orthur Carahar, and tried by the court, jury having been waived, in the Musicipal Court of unicago. By the jurgment, the defeadant was sentenced to the House of Correction for one year on to pay a fine of one (#1.00) Bollar.

The trial of the defendant was on an information filed in the office of the clerk of the bunicipal court of this go, and it med and sworn to by one, Arthur Caraber. This information charged that the defendant on the 23rd day of June, 1979, at the City of Chicago, dic unlawfully, knowingly, and wilfully encourage one William Reed, a male person under the see of eighteen years of age, to-wit, sixteen years, to become a delinquent child, and did then and there, unlawfully *** do acts which directly produced *** and which tended to render the said "illiam Ased to be or become a delinquent child, in that he, the said Charence malker, did then and there expose his person to the said william Reed contrary to the form of the Statute.

In considering this appeal, the evidence that was heard by the trial court is not in the record, so that we will assume that there was evidence to justify the Court's action provided there was a surficient criminal charge to justify the court in entering the judgment is question.

The defendant did not object on the trial of this action to the information as to fore or substance until on the End day of October. 1939. We then goved the court to expunse the order and judgment entered in in the court of the court of

ALABA TID AN BEEDE IN THE ALAPKAN AND INTERNAL

This appeal by the defendant is from a judgment of guilty in a criminal method, victoin on duma to, 1808, an information was filed in the office of the eleck of the sumistical Court of the Sity of Unicapo, eigned by one, arthur Cereber, and twied by the court, jusy having been waived, in the Numicipal Lears of Ceiesco. By the jobseent, the sateniant was neateneed to the Voyce of Correction for one year and to you a fine of ane (11.00) poller.

The trial of the defendent was on an interestion filed in the office of the clark of the Numicipal Court of Chicago, and Agned and Tomiant on the Elvá day of June, 1975, at the City of Chicago, did unperson under the age of eighteen years of ego, to-vit, sinteen years, to become a delinquent child, and did then and there, unlawfully we do note which directly produced was and which tended to realer the said william head to be or became a delinquent child, in that he, the said william thed to be or became a delinquent child, in that he, the said william Charence Valker, did then and there expanse his person to the cald william deed contrary to the riors of the statute.

In considering this appeal, the evidence that was heard by the trial court is not in the recore, so that we will escue that there was evidence to justify the Court's action provided there was a sufficient evidence to justify the court in entering the judgment in question.

The defendant did not object on the trial of this action to committee or low or cotober, settles noved the court to expunse the order and judgment entered.

in the case on the 19th day of Jone, 1939, for the following reasons;

Among other objections be complains that the complaint states no expect of action or offense a sinst the secole of the state of illinois, and further that under the states of the State of illinois, the acts constituting the cries of delinquency are specially sefined, and that the court as sithout jurisdiction in the above mentioned matter to enter the sentence imposed on the defendant. This cotion of the defendant was denied, so that the question arises as to the sufficiency of the information in that it fails to charge a crime in the language and towns of the statute, and that the court was in error when it entered the judgment.

Under the statutes in question it is necessary that there be a charge that the defendant wrongfully and unlawfully contributed to conditions that rendered the child delinement, in that the defendant did then and there take and expose his person in the same of the conditions.

One of the cases of this court that has passed upon a like question is the case of the result of the living of illinois v. about follows, 188 ill. App. 213, In which this amount a id the judgment is sought to be reversed upon assignments that error as somitted by the court in everysling the motion of the lefendant to quash the information, and also the motion in errest of judgment. The sourt further want that Robert values, on lebruary 18, 1932, as sharped in the openion in it

"uniawfully, wilfully and knowingly encourage, sid, enuse, set and connive at the delinquency of one inputhy mohenbusch, a minor female child under the set of 18 years, to-sit, 18 years,"

The Court further says:

"that portion of the information entine with the words, '10 years', charges a crime in the language of the statute. The remaining partion should be regarded as surplusage. In our action 'the nature of the offence', as set forth, 'may be easily understood,' and section 6 of division II of the Original Jode applies."

In addition to the case just quoted, there has been colled to the attention of this court, the case of <u>Feorla</u> v. <u>Joseph Hamilton</u>, 727 Ill. App. 641, and in this case the court held that the information

in the once on the 18th day of Jume, 1979, for the following remaining

twong other objections are instable the complaint states.

no cause of setien or offense are instable of the date of Illinois, and further that under the states of the setate of Illinois, the setate occupitating the orige of deligations are specially leftered, and that the court was mithout jurisdiction in the above armitioned writer to enter the court was mithout jurisdiction in the above armitioned writer to enter the content and that the question arises as to the sufficiency of the information in the state in that the trace of the information in the states and terms of the judgment, and the fact the court was in the language and terms the judgment, the states in the states in the states the judgment, and the fact the states in the state of the states of the s

Daier the stabiles in oursion it is mestaday that there has churge that the defendant aroughlily and university contributed to contitions that randered the chila delinquent, in that the defendant distant and the unit share this consistint.

one of the case of the Papis of the State of illesis v. court curstion is the case of the Papis of the State of illesis v. court alless. 185 Ill. 179. IlS, in which this fourt said "the judgement is cought to be reversed apon assignments that error is consisted by the court in oversaling the motion of the defendant to quest the information. and also the motion in errors of judgement." The court forther cuid then and also the information.

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In addition to his wese just quoted, there has been called to the attention of this court, the case of fracing v. Jensia W. wilton. 1811. App. 641, and in this case the court hald that the information

charge was in the language of the statute. The information there charged that the defendant

"did unlowfully, knowingly and silfully encourage audrey and hirley Ulrich, a female person under the age of 15 years, to-wit, 5 years and 5 years of age to be or to become a deliquent child and did then and there unlawfully, knowingly and wilfully is sets which alrectly produced, promoted and contributed to condition; which traded to render said Audrey and Mirley Ulrich to be or to become a delinquent child in that he, the said Joseph Hamilton did take indepent liberties with the said Audrey and Mirley Ulrich in his candy stars located at 2004 Mebensia and esuse the said Audrey and Mirley Ulrich in his candy stars located at 2004 Mebensia and esuse the said Audrey and Mirley Ulrich to commit indepent and laselvious acts, contrary to the firm of the statute..."

Further in its opinion, the court said that

"the information is sufficient which states the offenes in the terms and language of the Statute creating the offenes, or so plainly that the nature of the offenes may be easily understood. People v. Jostture, 238 fil. 218; Stroke v. scople, 180 hi. 582; Locky v. Facple, 182 hil. 503; Locky v. Facple, 182 hil. 503; Julier v. Facple, 183 hill. 503; Julier v. Facple, 183 hil

Under the provisions of the Statute, provided for in fer. 104, sec. 2, entitled "Criminal Code," Swith-Hurd Nev. Itat. 1935, and expecially from the provisions that

"Any person who shall answingly or wilfully cause and or securage any male under the age of seventeen (17) years or any female under the age of eighteen (18) years to be or to become a celinquent child as defined in section one (1) *** shall be guilty of the crime of contributing to the delinquency of children,..."

especially when it is provided in par. 103, sec. 1,

"or inducing or encouraging the use of vile, obscene, vulgar, professor indecent language in any public place or about any school house; or is guilty of indecent or lascivlous conduct."

The defendant calls the court's attention to the fect that this information does not specifically charge or allege any offense which would come within Chapter 38, section 100, of the Illinois State Dar Association Statute, swith-Murd, Chapter 38, Section 104, and that the information charges that he exposed his person to said william Reed, which act would not necessarily be a criminal offense in the absence of additional circumstances not alleged in the information. Movever, while there is no authority of a court of last resort in this state, having passed on a like question, in the case of Femple v. Fratz, 200 Nich. 224,

Augusto courts moise arbust after adjusted and to engage and at easy payred Promising land, made from

fild bar gother egateens glimile has yf mivori . und S years of aga to be on he demons a delinement child and it then and there wherefully incomingly and militally do seek of the อกระได้เป็นกระ อาการสารแบบ การ เกลา เมื่อสารแบบ การ ของเกลาสาร การสารเกลาสาร Therefore with the paid desirer and column trivial in the past; where -II yelahi lan yerbua bira shi onuas ima ond leading continue and leading to the faca "ALLEY SECTION SET IN

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especially stem it is provided in per 107, sec. 1.

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pessed on a like question, in the case of Fortis v. Frank, fit Mich. Cli.

the court in its opinion said:

"The real action on post plivinger significance of the phrase 'indepent and absorbe exposure of the person' is the children of those private parts of the person which instinctive consty, has a decency or natural self-respect requires shall be sustainedly lept covered in the presence of others."

this court, we will presume that There was sufficient oriones to justify the court in entering the judgment. ... Tellsve that upon the record before this court, the court sid not are in Finding the de-fendant guilty and fixing the punishment.

For the reasons stated, the judgment is affirmed.

AFFERDRED.

DENIS E. SULLIVAN, F.J., and BURKE, J, CONCUR.

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FRED REEPER.

Plaintiff - Appellee,

INT BLOCUTORY APPRAL

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No. 533812, Superior Source of Cook

County, Illinois, and "UNKNOWN OWNERS".

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SUPERIOR COURT

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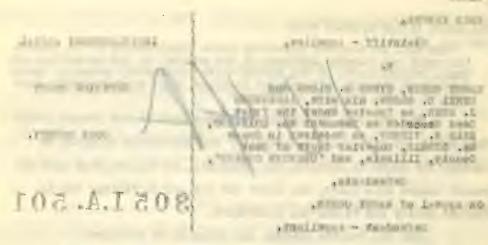
On appeal of Hanny Collen,

Defendant - Appellant.

305 I.A. 501

MR. JUSTICE HEBEL DELIVERSO THE OPINION OF THE COURT.

This is an appeal by the defendant from an int vicewory order entered on January 18, 1940, on plaintiff's verified potition filed in a suit to forcelose a junior trust deed and sking for the appointment of a receiver for the premises described in the minintiff's complaint. To this petition, defendant, darry Johan, the owner of the equity of releastion filed a verified answer. From all diseastions in the complaint, it appears that the plaintiff is the owner of a junior mortgage securing an indebtedness in the principal sus of Fourteen Thousand Five Hundred (014,500,00) Bollars, the uncaid belance of which is in the sum of Thirteen Thousand Sine wundred (13,000.00) Dollars and became entirely due on wavember 1, 1331. hen plaintiff filed his complaint to foreclose the wortgage in this owne, interest had accrued on said principal belance to the extent of Tleven Thousand live Hundred Fifty and 78/100 (11,150.75) bollars, thus aggregating a total indebtedness of Treaty live Thousand four Hundred Fifty and 78/100 (35,450.78) Dollars. A first mortgage encumbering the presizes had been foreclosed and a decree of foreclosure and sale was entered by the court, sursuant to which a le was had on October 25, 1936, for Twenty One Thousand (221,000.00) Dollars. On October 15. 1939, plaintiff redeemed from said sale and paid the Waster in Chancery who made the sale the max of I enty lour Thousand Nine Sundred Sixty



With abstract market and the contract courses on This is an appeal by the defendant from an interlocatory order believed no Jemony 18, 1840, on chalatt's semified pointed Villes Villes add not galke have been sours roland a cooleanor of the a al a Trintale and ni badirosab esaises est vel veriener a la ineasalouge complaint. To this potition, defendent, Marry Lohan, the owner of the soulty of redemption files a verified anguer. From all allegations a to reasont, it appears that plaints it is somelynes at To any Lecterity sat al acombodyshal as galtuous apaytron tolaut blocks and incelled (00.000, all) being and incelled to being the warden technor soft homeser started to now tor of all daine to managed "dis. 200.000 Deligre and become entirely due on Mayempar 1, 1951. "her plaintiff filed his commicing to foreclose the mortinge in this owner, interest had sourced on mid principal belance to the creek of Eleven Thousand live Hundred Fifty and VS/100 (111,880.75) Collers, thus perhaps a total indebtedases for the section is not a post of the ond 78/100 (28,480.78) Unilare. A first mores enoughering elve has equesisered to sereet a has beeslowed need bad esciment add redeson no had now of a mile of financia, runo od to better now 25, 1938, for Twenty Une Thomsond (121,000.00) Bellurs. On Setelar 25. 1229, plaintiff redeemed from rela male and the season tilining con who made the sale the sure least lier Thomsend him blos and alon only ix and 40/100 (1.4,300.40) believe, and received a contificate of redemption.

By his foreclosure, plaintiff seeks in addition to other relief to add the ambies expended for relegation to the mortage indebtedness, the subject of this for slosure proceedings, which rates total injectedness of lifty Thousand Four Lindred Seventeen and 18/100 (\$50,417.18) Dollars.

Oyrus B. Olson and Ethel D. Olson were makers of both mortgages and conveyed the remises in 1978 to a runter to ascure the payments of amounts due under the marty see, and, there for, did not appear in the chain of title.

Harry Cohen, the defendant, acquired title on December 5, 1959, forty days after the expens right to redeem from the male under the first mortgage foreclosure had expired.

On January 12, 1940, plaintiff applied to the court for the appointment of a meceiver based upon his verified solition in conjunction with the complaint. The 15 month statutory seried of the redemption from the sale provided for in the accress in/ stor foreclosure case was to expire on January 30, 1940, and the acciver in measuresion of the premises by virtue of the crior proceedings was entitled to retain possession until that time. Plaintiff's motion was continued until that time, at which time the defendant, without previously living notice to the plaintiff, filed an ensure to minimisf's patition, no answer having at that time been filed to the complaint.

that Cyrus a. Olson and Ithel D. Olson, makers of the trust deed and sortgage are insolvent and eithout personal means to pay or satisfy the indebtedness due plaintiff; that they are no longer the owners of the equity of redemption and do not reside on the premises; that marry lohen is the present owner and does not reside on the premises and that petitioner does not have any knowledge of his present whereabouts.

Tix and 40/100 ([.4,388.40) bollers, and received a cortificate of

by his forealeaure, picintiff seeks in andition to other relief to aid the mortgage tribs and the contempt to the mortgage tribs and this duese, the subject of this forealeause proceedings, which makes I indebteduese of lifty Thousand Four Andred Seventeeu and (155,417,18) hellers.

Tyrus M. Alson and sthel M. Cleon were waters of both mortgages and sourayed the premises in 1899 to a Trustee to soours the pryments of amounts due under the mortgages, and, themenitur, did not enter the civils of title.

the first wartgrap foreclosure had expired.

Condensest of a manaiver based upon his verified settion in the appointment of a manaiver based upon his verified settion in the same that said provided for in the decrea in/grior foreclosure same was to expire on January 25, 1260, and the modelver in possession of the premiers by wirths of the orior proceedings was entitled to set that time.

The provided in inswer to picintiff settition, no manaive to the plaintiff, filed in inswer to picintiff's settition, no manaive to the plaintiff, filed in inswer to picintiff's settition, no

rus E. Cleon and Thiel C. Class, wekers of the trust deed and insolvent and without personal means to pay or satisfy and the contract of the contract and contract and the contract and contracts.

On January 25, 1940, the defendant, Harry Cohen, by leave of court, filed his has a to said setition, which denied that there yes due plaintiff the sum of resuty live incurant your hundred lifty and 78/100 (35,450.78) Jollars, on said junior trust lead sought to be forcelosed; that will trust deed and notes were delivered to one, Custave J. nderson, in consider tion for samey due him for execting the building on presises described in the conclaint for Cyrus J. Glass; that subsequently, Olson defaulted in thy what of noise and entered into an agreement with Inderson whereby class and his wife would convey premises to Interson, in consider-tion sucreof, interson would cancel the trust deed and notes sought to be foreslosed berein; that pursuant to the expensent, Syrum b. Cleon and thel Cleon conveyed the premises to Justive inderson on Merch 33, 1939, which deel was recorded as document so. 10314193, and - in full symmt and matisfuction of indebtedness and notes and trust deed representing same and that thereby the lien of the trust deed became extinguished and mer ed with the fee of presides; that by reason of and serger there is nothing due to plaintiff under and trust doed and notes; that almistiff is barred from maintaining the present action to foreclose and trust deed.

The enswer of the defendant admits that on Detober 38, 1939, plaintiff peid Master Lantry Tenty Four Thousand Nine Hundred Dixty Dix and 60/100 (134,866.40) pollars, and that enid Baster issued a certificate of redemption, and the defendant denies that plaintiff is entitled to recover Taenty your Thousand sine hundred Dixty Dix and 40/100 (124,866.40) Dollars, as an advancement under said Frust deed and denies that there is due plaintiff the sum of Fifty Thousand Four Hundred Seventeen and 18/100 (150,417.18) Dollars, or that the trust deed is a lien on the property described.

It further appears from the Ansier that the precises are on the northwest serner of sellington and Sentral avenues, Unicapo, and are improved with a three story brick building, containing 18 apartments

deed.

The susser of the defendant white that on Cotober 85, 1935, sartificate of redemption, and the defendant denies that plaintiff is entitled to recover fronty four Thousand Rine Rundred Sixty Fix and 40/100 (FM, 285.49) Bollers, as an edychosusent under sold trust dead faudred Seventeen and 18/100 (480, 417, 18) Delives, or that the trust faud feventeen and 18/100 (480, 417, 18) Delives, or that the trust feach is a lien on the present described.

The state of the s

and 3 stores and that the monthly income derived therfrom is approximately 700.00 to 800.00 per month, or 10,700.00 per year; that the improvements are approximately 10 years old and that the entire property has the fair oach market value of lifty Thousand (180,000.00) Pollars.

The contentions of the defendant are that the burden of showing the necessity for the appointment of a receiver is on the plaintiff, and to t plaintiff has not sustained that burden either by the Complaint or setition or by testimony. Plaintiff's answer to these contentions is that a court of chancery will appoint a receiver on consideration of all the equities in the case in order to preserve the property in its custody for whichever of the parties will ultimately prove to be entitled thereto.

It would appear from the Answer of the defendant that he contends plaintiff's mortgage is invalid because it is marged with the title, and further that plaintiff's redenction is void. This, of course, is a question which is the issue to be determined by the court on a final hearing. The question which we are concerned with is whether the court was in error in appointing a receiver where it appears from the statements which are contained in the petition and complaint and the answer of the defendant and not being in possession of the premises, there is an issue of fact to be determined by the court and apply the law as it will control upon a question of like character.

It would seem that the defendant would have no standing in court upon the question that we have before us for the reason that the court has not yet determined whether there was a merger of the title; and, therefore, there was a situation that the court was obliged to take into consideration in the appointment of the acceiver in question. Under the circumstances the court was justified in appointing a receiver until the acceives which were raised by the

and 3 stores and that the mostaly income derived therfrom is agreentestely 1700.00 to 4600.00 per mostal, or 10,000.00 per pear; that the the tag two exercises are approximately layers of tifty thousand entire property has the fair useh wardet value of fifty thousand (150,000.00) believe.

The contentions of the detenions are that the burden of shouling the newsocity for the sepulatorate of a receiver is on the plantiff, and that olimitif has not sustained that burden either by the Secolatic or petition or by testicony. Plaintiff's assert to these contentions is that a court of chausery will expaint a receiver on consideration of all the scuities in the case is order to preserve the property in its ocetady for whichever of the parties

It would appear from the thoses of the defendent that he contends plaintiff's mortgage is invalid because it is marged with the contends plaintiff's mortgage is invalid because the contend of the contend which we are concerned with is whether the court was in error in appointing a receiver where it appears from the statement which are contained in the printion and complaint and the anaest of the defendent and not being in presented at the president, there is an issue of from to be determined by the court and apply the law on it will central upon a question of

It would seem that the defendant would have no standing in sourt upon the verson that a part on the verson that the court has not yet determined whether there are a merger of the veliced to take into consideration in the appointment of the headyer to cake into consideration in the appointment of the headyer is a consideration. There is a consideration in the appointment of the headyer is a consideration.

issue are determined and a Jeorea upon the question is anyoned.

receiver should be appointed if it is made to appear that there is
a necessity to preserve the property for such parties as chall be
entitled to the benefit. <u>itst betional Jan.</u> v. 1996, 73 111. 307, 379.

There is a further question which should be considered. it having been aske by the defendant, that there are utterly no croof made as to the value of the property, and that the complaint and petition ande no adequate statement of its volue, and that the court took no evidence, refusing an offer of defeatant's connect to de so. Of course, the derendent in his enever educated that the descrift invested in the redemption of the premises, which would indicate that he has a substantial interest in the subject matter of this litig tion, and if the derendant leaired to offer testimony upon the question of the finencial interest which the elaintiff had in this forcelosure proceeding, he could have offered svidence by calling witnesses to the stand for the ourpose of tactifying and ir this was refused be could have offered to prove the facts which he believed the witnesses sould have proven by their testimony. This the defendant did not do, and as the court in the case of itevens v. Merman, 60 Ill. App. 549, stated in its opinion:

"A mere statement of an offer to prove is not anything upon which a court is called upon to act. The witnesses should be called and suestioned, or documentary evidence produced."

and again in the case of Strong v. Friedman, Oct 111. App. 50%, the court quoted from case entitled Thicage City My. Do. v. Carroll,

206 Ill. 518, upon a like question, where the court said:

[&]quot;Appellant, in fact, offered no evidence upon the matter. No witness was put on the stand; no question was asked. Mothing was done except a mere conversation or talk had between counsel " " and the court. Buch procedure as that isse not assumt to an offer of evidence, and the remarks of the court did not assumt to a refusal to admit evidence. " " If askellant desired to make the contention it now makes, it should have at least put a witness upon the stand and proceeded for enough that the question relating to the point it is now sold it was desired to offer evidence upon as reached, and then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked."

isone are determined and a peerso ama the continu is entered. I receiver amount to appear that there is a meastaff to preserve the property for such certime so abuil he antitled to the headit. These desicant deak walled to the headit. These desicant deak walled.

There is a further curetion this chould be sentiared,

Toors on wire of the form and the there was not to about most univer unde us to the velue of the property, and that the accoplates and truce fai said the and relate at the destrict adopted on about the took us evidence, refuging an exfer of defeadant's councel to do no. Thinkely add fedd kalfimha rowens aid ai thalastab add earnoo to Appealed in the redemption of the exemises, which would indicate mint ha ration toridus out at tarretal Interpreduce a and all taid noru ymenisad refto od barical dadine oh ad li ha . noit misli at had hitshely and dolar secretai Laloncath and he colleges add this forestasors proceeding, he could have offered evidence by li has unighidand to occurry and usi hards and as assumptive unilles of dollar whose and every of beretty even bloom of beenter see alul believed the witnesses would have proven by their tratingmy. 32119 anguard? To seen and al falme and we has as don bib fuchuetah add v. Merman, de Ill. Ang. 548, stated in its evinton:

court macted from ones entitled <u>Thioses Clty By. Co</u>. w. <u>Carrell,</u>

anks the contention it has makes, it should have ut loset put a make the court to rule upon it.

the court to rule upon it,
be proved by the withmess, if he was not allowed to enewer question caked.

From this record as we have examined it the court did not refuse to have evidence from a situation on the stand randy to testify. The defendant contends that the court utterly failed to take any evidence thatever on the contention, but even refused to do so, and based its order for appointing a receiver on the scarn cardiant and petition only, and that such action was contrary to law.

has we have already indicated the question presented to this court is a question of serger; that being a question which will have to be determined by the court on the hearing, we are not of the opinion that the trial emert errod in appointing a receiver of the property in question.

The question which remains to be determined in whether the court in entering an order appointing a receiver without any testing whatever abused its discretion. In one of the cases called to our attention by the plaintiff, mehack v. soley, 87 Ill. App. 480, this court said:

An application for the appointment of a receiver is addressed to the sound judicial discretion of the court, taking into account all the circumstances of the case, and, if exercised, is for the purpose of promoting the ends of justice and of proteotics the rights of all the parties interested in the controversy and the subject matter " * "."

and again this court said in HeDougall Co. v. soods, 347 III. Aga. 170,

"The primary purpose of the statute is to permit a review of the exercise of the discretion lodged in the chancellor with the purpose of determining whether the interlocatory order probably was necessary to maintain the status quo and preserve the soutable rights of the parties."

Under the facts as they are alleged in the plaintiff's complaint and petition for the appointment of a receiver and the defendant's answer, we believe that the court was fully justified in appointing a receiver and did not abuse its discretion in making such appointment.

For the rescons stated the order of the Court is effirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURER, J. CONCUR.

yros this coners on three enteres on the circle ready to the the refuse to have tree to the the refuse to have the court of the court of this state the court of this state the tree ray criterion whetever on the restention, but even refused to do so; and retition only, and that we not not constant to have the continue to the continue to have refused to the continue to have red the continue to have the hadden continues to have

As we have already instanted the exempted to the state proceed to this court is a constitut of serger; that being a constitut with a court on the hearing, we are not of the epinion that the the trial court error in appointing a receiver of the tin appointing a receiver of the

The dustion which results to be determined is entthey the court in sutering an order equalities; a receiver without any resilical managers abused its distriction. In one of the Ocean culted to our attention by the plaintiff, Jeneral v. Mosey. 37 III. Tops diff. this

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PUBLISHED IN ABSTRACT

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People of the State of Illinois, Plaintiff in Error, v. James D. Flynn, Defendant in Error.

Gen. No. 9222

305 I.A. 619

Mr. Justice Fulton delivered the opinion of the court.

The grand jury of Champaign County returned an indictment against James D. Flynn on April 12, 1939, for malfeasance in office. The indictment consists of nine counts. The first count charges that the defendant, during all of the time between the 1st day of January, 1938, and the 15th day of February, 1939, was the duly elected, qualified and acting Mayor of the City of Champaign, in Champaign County, Illinois, and that during all of said time he did wilfully, intentionally and unlawfully fail and omit to perform his official duty as Mayor of the said City of Champaign, in that he did, then and there, wilfully and intentionally fail, neglect and omit to use any sincere effort or to make any sincere endeavor or attempt whatever to stop gaming and the keeping of common gaming houses in said City of Champaign, which said gaming was then and there in progress and which said common gaming houses were then and there being kept and operated in said City of Champaign, in violation of the laws of the State of Illinois. And so the grand jurors charged that the defendant "is guilty of a palpable omission of his official duty."

The second count is the same as the first count, except it charges failure to make "any effort" to stop the keeping of houses of ill fame.

The third count is the same as the first count, except it charges a failure to make "any effort" to stop the setting up of lotteries for money.

The fourth count is like the first count, except it charges that it was the duty of the defendant to make a sincere effort to stop gaming and the keeping of common gaming houses in the City of Champaign, and it does not add the charge that he "is guilty of a palpable omission of official duty."

The fifth count is like the second count, except it charges that it was the duty of the defendant to make a sincere effort and endeavor and attempt to stop the keeping and maintaining of houses of ill fame, and it



charges that the defendant then and there "wilfully, knowingly, intentionally, palpably and unlawfully" failed and omitted to perform his official duty as Mayor in that he wilfully, knowingly and intentionally failed, neglected and omitted to make any sincere effort or endeavor or attempt to stop the keeping and maintaining of houses of ill fame, etc.

The sixth count is like the third count, except it charges that it was the duty of the defendant to make a sincere effort and endeavor to stop the setting up and promotion of lotteries for money, and that the defendant "wilfully, knowingly, intentionally, palpably and unlawfully" failed and omitted to perform his official duty in that he failed, neglected and omitted to make any sincere effort to stop the setting up and promotion of lotteries for money.

The seventh count is like the fourth count, except that it pleads an ordinance of the city of Champaign, which provides that the Mayor "shall have the general supervision and control of the police," and charges that "it then and there became and was the duty of the said James D. Flynn, under said ordinance and under the laws, to make a sincere effort and endeavor and attempt to stop gaming and the keeping of gaming houses in the said city of Champaign.

The eighth count is like the fifth count, except it pleads an ordinance of the city of Champaign, which provides that the Mayor "shall have the general supervision of the police" and charges that "it then and there became and was the duty of the said James D. Flynn, under said ordinance and under the law, to make a sincere effort and endeavor and attempt to stop the keeping and maintaining of houses of ill fame in

the City of Champaign."

The ninth count is like the sixth count, except it pleads an ordinance of the City of Champaign, which provides that the mayor "shall have the general supervision and control of the police," and it charges that "it then and there became and was the duty of the said James D. Flynn, under said ordinance and under the law, to make a sincere effort and endeavor and attempt to stop the setting up and promotion of lotteries for money in the City of Champaign."

Three of these counts - the first, fourth and seventh-are based on the failure of the defendant to stop gaming and the keeping of common gaming houses in the City of Champaign. Three of the counts -the second, fifth and eighth-are based on the failure



to stop the keeping of houses of ill fame in Champaign. And three of the counts—the third, sixth and ninth are based on the failure to stop the setting up and promotion of lotteries for money in the City of Champaign.

Seven of the counts—the first, fourth, fifth, sixth, seventh, eighth and ninth-charge a failure to make any "sincere effort" to stop gaming, etc., and two counts-the second and third-charge a failure to make "any effort" to stop the keeping of houses of ill fame, etc.

Three of the counts—the first, second and third charge that the defendant "wilfully, intentionally and unlawfully" failed to perform his official duty as Mayor, and six of the counts—the fourth, fifth, sixth, seventh, eighth and ninth—charge that the defendant "wilfully, knowingly, intentionally, palpably and unlawfully" failed to perform his duty as Mayor.

The defendant in error filed a motion to quash the indictment and each and every count thereof. After argument the Circuit Court of Champaign County allowed the motion, entered an order quashing the indict-

ment and discharged the defendant in error.

The plaintiff in error contends that the indictment is sufficient to charge the defendant in error with palpable omission of duty and asks that the judgment of the trial court be reversed and the case remanded for trial.

The defendant in error insists that the order of the Circuit court was correct and sets forth many reasons why the indictment is insufficient. In our view of the case it is only necessary to consider the second ground urged in his brief as follows:

"The indictment is defective because it does not apprise the defendant of the nature and cause of the accusation against him with sufficient particularity to enable him to prepare his defense and to plead conviction or acquittal in bar of a subsequent prosecution."

The charge in the indictment in this case is based upon the violation of Par. 449, Chapter 38, Ill. Rev. Statutes, 1937, State Bar Assn. Ed., which reads as follows:

"Every person holding any public office (whether state, county or municipal), trust or employment, who shall be guilty of any palpable omission of duty. or who shall be guilty of diverting any public money from the use or purpose for which it may have been



appropriated, or set apart by or under authority of law, or who shall be guilty of contracting directly or indirectly, for the expenditure of a greater sum or amount of money than may have been, at the time of making the contracts, appropriated or set apart by law or authorized by law to be contracted for or expended upon the subject matter of the contracts, or who shall be guilty of wilful and corrupt oppression, malfeasance or partiality, where no special provision shall have been made for the punishment thereof, shall be fined not exceeding \$10,000.00, and may be removed from his office, trust or employment."

The plaintiff in error suggests the section of the Statute which provides than an indictment in the language of the Statute creating the offense or so plainly that the nature of the offense may be easily understood by the jury is sufficiently correct. Ill. Rev. Statutes,

1937, Chap. 38, Par. 716.

The Sixth Amendment to the Constitution of the United States provides that the accused has the right to be informed of the nature and cause of the accusation against him.

Section Nine of Article Two, of the Constitution of the State of Illinois provides that the accused has the right to demand the nature and cause of the accusation

against him.

In many cases in Illinois, it has been held that such constitutional provisions mean that sufficient facts must be set out in the indictment or information to enable the defendant to prepare his defense and to avail himself of his conviction or acquittal for protection against further prosecution for the same offense. This appears to be a necessary requirement even though the indictment or information was set out in the specific language of the Statute.

In the case of *People* v. *Green*, 368 III. 242, the information charges that the defendant did "drive a vehicle upon a public highway of this State situated within the limits of the City of Chicago—with a wilful and wanton disregard for the safety of persons or property", etc. The basis for the indictment was the violation of Sec. 48, Par. 323, Chapter 121, of the State Bar Ed. of Rev. Statutes, 1935, which provided:

"Any person who drives any vehicle with a wilful or wanton disregard for the safety of persons or property is guilty of reckless driving."

The Supreme Court held the information insufficient and void and said:



"The information in the present case did not allege a single fact and there was nothing in it from which the defendant could tell definitely, or even guess, what acts he may have been charged with. It might have been driving while intoxicated, or running through a stoplight, or driving at an excessive speed or without brakes, lights or horn; he may have been driving on the wrong side of the road or on the sidewalk, or without keeping proper lookout for children, or any one of dozens of things which might constitute wilful and wanton disregard for the safety of persons or property. Neither does it specify where the offense took place, as it might have been on any street or highway in the whole of Chicago, and it might have taken place on any date within eighteen months prior to the filing of the information. All that appears in this information is that in the opinion of the person who wrote it and the person who signed it, the defendant had been guilty of driving a vehicle with wilful and wanton disregard for the safety of persons or property. It thus fails to meet either of the two basic requirements of an information. It does not give defendant enough information to prepare his defense and it is not sufficiently definite to be of any value as a bar to further prosecution."

In People v. Brown, 336 Ill. 257, an information charged that the defendant "did wilfully and unlawfully practice a system or method of treating human ailments without the use of drugs or medicine and without operative surgery, without a valid existing license so to do". The information was couched in the language of the Statute. The Court quoted and adopted the following rule: "As the rule is sometimes stated, the allegation must descend far enough into particulars and be certain enough in its frame of words to give the respondent reasonable notice of what will be produced against him at the trial," and further "The general rule is that it is sufficient to state the offense in the language of the Statute, but this rule applies only where the Statute sufficiently defines the crime. Where the Statute creating the offense does not describe the act or acts which compose it, they must be specifically averred in the indictment or information." Many other Illinois cases have announced and adopted this rule. People v. Barnes, 314 Ill, 140. People v. West, 137 Ill. 189.



The indictment in this case does not allege any knowledge on the part of the defendant in error. There is no charge in any of the counts of the indictment designating or setting out where the said law violations occurred, when they took place or the persons or places conducting the said violations of the Statute.

We cannot conceive how a defendant could possibly prepare a defense to such blanket charges covering a period from January 1st 1938 to the 15th of February, 1939. The prostitution, the lotteries and the gambling complained of might have been conducted by various people at various locations and at various times, all of which were unknown to the defendant in error.

In our judgment the indictment does not give the defendant enough information to prepare his defense and it is not sufficiently definite to be of any value as a bar to further prosecution. The Circuit Court correctly allowed the motion to quash and the judgment is affirmed.

Affirmed.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HURFMAN, Justice

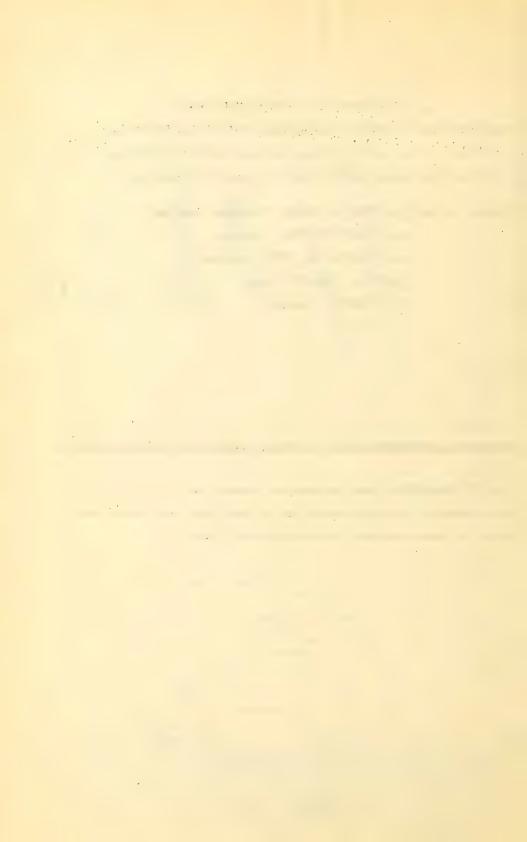
Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On APR 2
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:





IN THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

FEBRUARY TERM, 1940

Laura M. Russell, (Plaintiff) Appellee

Appeal from County Court
of Peoria County, Illinois

Vs.

New York Life Insurance Company, a corporation, (Defendant) Appellant.

WOLFE, P.J.

On March 15, 1926 and July 29, 1926, the New York Life Insurance Company issued two policies of insurance to the plaintiff. Each policy contained a total and permanent disability clause as follows: "Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit." On September 12. 1938, the plaintiff, Laura M. Russell, plaintiff-appellee, instituted a proceeding against the New York Life Insurance Company, the appellant, in which she calimed that she was totally, permanently, continuously and wholly disabled and prevented from performing any work or engaging in any occupation for compensation. The defendant filed its answer and set forth the disability provisions of the policies and denied liability, claiming that the plaintiff was not totally disabled, as required by the policy of insurance. The cause was tried before a jury resulting in a verdict in favor of the plaintiff for \$516.00. Judgment was rendered on the verdict, and the New York Life Insurance Company perfected an appeal to this Court.

The plaintiff introduced evidence tending to show that while she was endeavoring to hang wall paper in her home, she was standing on a board which was placed across a writing desk, and that she fell off of the board and hurt her back. The testimony further was that as a result of such fall, whenever she tried to work, she had pains

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LOWELL E.J.

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and threw up her food; that she had to remain on a diet of fruit juives, soup and liquid: that she was unable to do, and had not been able to do any work of any kind; that she had beencontinuously prevented from doing any work since her accident. Doctor C. A. Cox testified that he had examined the plaintiff; that she had tenderness across her back and in his opinion, she was totally disabled from doing any work. Poctor E. C. Burhans was called as a witness and his testimony is similar to that of Doctor Cox. rebut this evidence that the plaintiff was totally disabled from doing work, the defendant called numerous witnesses, some of them next door neighbors of the plaintiff, who testified that they observed the plaintiff doing the work around the house since the accident; that she did part of her own ironing; that she would sweep off her steps and sweep the living room; that the plaintiff had stated to one witness. "That if she was not able to get any disability from the Insurance Company, that she would like to get a job in a restaurant as a waitress." Witnesses further testified that they had seen the plaintiff hanging up clothes, carry clothes, handling boxes, driving the car, carrying the rakes and shovels in the yard around the house, pick bears in the garden, and climb through the garden fence. Other witnesses testified that they had seen the plaintiff drive her car, dance, eat fried fish, potatoes, vegetables and everything else that any one in normal health could eat.

This Court had occasion in the case of Sibley vs. Travelers'

Insurance Company, 275 Ill. App. 323 and Buffo vs. Metropolitan

Life Insurance Company, 277 Ill. App. 366, to interpret the language
used in insurance policies of this kind. We there held that the

language is not ambiguous and that before a person could recover

under such policies they must show that their disability was such
that they were wholly prevented from performing any work of following
any occupation. The Appellate Court of the Fourth District in the
case of Wayckoff vs. Metropolitan Life Insurance Company in 302

App. at Page 241 held, that when a woman had had tuberculosis for
three months and the doctor had reported that the disease was arrested,
and that he had permitted the plaintiff to do light housework, under

and there we her food; that the to remain on a clat to fruit juices, moup and liquid; that she was washle to do, and had not been able to do any work of any kind; that ehe had been antimously provented from Coing my ward since her accident. Seeler U. A. Gow testiff; This is on a cramined the plaintiff; that the bad and tendervers seress ber beek and in his opinion, me was totally Sississ from doing any work. Doctor I. U. Inriers was called as a witness and his tearingny is sirilar to there of Doctor Cor. No more believel vilator and thinkely edt tade complies aidt tuder doing work, the defendent selled numerous vitzerses, some of theu next door neighbors of the plaintiff, who tendified that they observed the blaistiff doing the work around the house cince the geour Minew of a fert inchest was ned to fung bie ode fadt inediose Betsis had Tiblishe and the Living room; the the bleintiff had state to one witness, unbet if he wer not elle to met eny dischility from the Ingress Corpore, that she would like to get a fet in a restourent as a waltress." "Threesess further testifules that they in I seem the pluistiff hearing we elether, earer clotter, handling boxes, driving the car, cerrying the raise and abovels in the rand around the bours, pick beens in the rapidos, and alink through the garden fence. ovint Thitminity and mean bad yeds smit boilitest seasons by rods her car, dance, oak fried field, potetest, remotebles and everthing . the bigge dilead factor of one you whit opic

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Life Insurance Company, 277 Ill. App. 366, to interpret the language
used in insurance policies of this bird. We there held that the
language is not emolyness and that before a person could recover
under such policies they must this thair disability was such
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come of Wayekeff vs. Herropolitar life Insurance Company in 362

App. at Page 241 held, that when a women had had suberculoris for
three months and the doctor had reported that the discuss was arrested,

the terms of a similar policy, she could not recover.

We are fully aware that it is a rule of law that after a jury had decided a question of fact, that great weight should be given it, both by the trial court and a court of review, but where the verdict of a jury is manifestly against the weight of the evidence, it is the duty of the reviewing court to set the same aside. In the present case we are of the opinion that the verdict of the jury was manifestly against the weight of the evidence, therefore, the judgment must be set aside. The usual practice in such cases would be for this Court to reverse and remand the case. Both the appellant and the appellee, in their printed brief, have requested this court, that in case this judgment was reversed, not to remand the case, but enter an order of reversal and terminate the litigation. Therefore, pursuant to the request of appellant and appellee, the judgment of the trial court will be reversed and the remanding order will be emitted.

Judgment Reversed.

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is and fully owere that it is a rule of law that after a jury had decided a question of fact, that great weight should be given it, just by the triel court and a court of review, but since the vention of a jury is manifestly against the weight of the evidence, it is the duty of the reviewing court to set the sence aside. In the present case we are of the episton that the vertical of the jury was remifestly against the veight of the evidence, therefore, in july as for the the court of the review of the court of the ones in such case and sent the captiles, in their refered brief, here requested this court, the case this judy as reversed, not to remand the case, has either an order of remark was reversed, not to remand the like ones, has either an order of remarks of appellent and appelled, the first thin court of reversed and the remanding the mainty the court of the remeated and the remanding and with the court of the remeated and the remanding and with the court of the remeated and the remanding and with the court of the remeated and the remanding and with the court of the remeated and the remanding and with the court of the remeated and the remanding and with the court will be reversed and the remanding and with the court will be reversed and the remanding and with the court will be reversed and the remanding and with the court will be reversed and the remanding and with the court will be reversed and the remanding and with the court will be reversed and the remanding and will be reversed and the remainding and the court will be reversed and the remainding and the court will be reversed and the remainders.

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STATE OF ILLINOIS, SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the St	tate of Illinois, and the keeper of the Records and Seal thereof, do hereby
	e copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.	
I	n Testimony Whereof, I hereunto set my hand and affix the seal of said
A	appellate Court, at Ottawa, thisday of
-	in the year of our Lord one thousand nine
h	undred and thirty
	Clerk of the Appellate Court



Be it Remembered, That, to-wit: On the 5th day of June,
A. P. 1940, certain proceedings were had and orders and entered of record by said Court, among which is the following,
viz:

In the Appollate Court of Illinois,

Second District.

May Torm, A. D. 1940.

Laura Russell,

Maintiff-Appelleo.

VS.

New York Life Insurance Company, a corporation, Defendant-Appellant. Appeal from County, Peoria County, Illinois.

IN RE: HATTOU VOR AMBARING.

The concluding part of the opinion filed in this case is,
"The usual practice in such cases would be for this Court to
reverse and remand the case. Both the appellant and appellae,
in their printe brief, have requested this Court, that in case
this judgment was reversed, not to remand the case, but enter an
order of reversal and terminate the litigation. Therefore, pursuent to the request of appellant and appellee, the judgment of
the trial court will be reversed and the remanding order will
be omitted.

In the petition for rehearing the appellee quotes the latter part of our opinion and now urges that this statement be given further consideration by this Court, that this court has misunder-stood the language used by the appellee in their briof. On Page 17, of the brief of appellee we find the following: "The verdict in this case is only for \$516.00. The case took three days to try. Further expense and additional time is required of both parties by virtue of this appeal. If this case is reversed and remended for another trial further expense, wested effort and delay will result to both parties. The defendants in their brief in the

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concluding paragraph state, " "Defendant respectfully requests that this Court reverse the judgment of the trial court without remand. We therefore join with the defendant in its request that this case be reversed outright or affirmed. The defendant company armos at some length about the weight of the evidence, and while this is unnecessary in view of its request stated above, we will give the Court our views of the question, although still join in such request."

It seems to us that the attorney for the appellee sould not have expressed in the English language more clearly a request of this Court that if the case was reversed, not to remand it.

The petition for a rehearing is hereby denied.

(Signed) Frenklin R. Dove
(Signed) Plaine Huffman

(Endorsed on the back as follows: FILTO Jun 5 1940 Justus L. Johnson Clark Appellate Court-Second Dist.) recording this state around a color of the c

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. VOLFE, Presiding Justice

Hon. BLAIME MUFFIEL, Justice

Hon. FRANKEN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. MENTER, Sheriff

BE IT RELEBERED, that afterwards, to-wit: On MAY 15 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

FEBRUARY TERM, A.D. 1940.

JOHN HOHNER, et al.,

Appellants,

VS.

APPEAL FROM CIRCUIT COURT LASALLE COUNTY.

AMERICAN SILICA CORPORATION, et al.,
Appellees.

HUFFMAN - J.

Appellee Beatty and appellants were interested in enterprises which owned and produced crude sand in Labelle county. Beatty and some of his associates conceived the idea of bringing together into one organization all of the crude sand pits in said county. Pursuant to such plan, Beatty employed one Mye Johnson to procure from the various owners of crude sand pits in said county, options to purchase their property. During the year 1927, Johnson went about among the owners of crude sand pits in that county, of whom appellants were a part, and in furtherance of the plan of Beatty as above indicated, procured from such owners options for the purchase of their property. It appears that appellants and the other owners understood the plan of Beatty to bring these pits under one organization.

In the following year, 1928, Beatty in consummating the above plan, caused to be organized the American Silica Corporation, under the laws of Deleware. The corporation was duly licensed to transact

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Appellants,

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The chief appellants and the other owners understood the class

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o following your, 1928, Esaity in consumnating the above at the be organized the American Silion Corporation, under

business in the State of Illinois. The main office was in Chicago.

Soon after the organization of the corporation, the Board of Directors met in Chicago, when Beatty was elected President. At a later day a resolution was eachted to amend the certificate of incorporation to change the capital stock from one hundred shares of no par value, to 65,000 shares, of which 5,000 shares were to be preferred stock having a par value of \$100 per share, and 60,000 shares to be common stock having no par value; and further, that the common shares might be issued by the corporation for services rendered and that the same should be deemed fully paid stock and not liable to assessment.

At a subsequent moeting of the Board of Directors, Beatty presented the proposal of Mye Johnson offering to transfer to the corporation the options he had taken on the crude send pits in LaSalle county, among which were those forming the besis of appellants' claims. The proposal was based upon the consideration that for said options Johnson was to receive 43,327 shares of common stock, 400 shares of preferred stock, and \$10,000 in cash. This proposal was accepted and the options duly assigned to the corporation. It then became necessary that the corporation float a \$1,000,000 bond issue in order to pay for the property covered by the options.

It appears that the 43,327 shares of common stock which constituted a part of the consideration to Johnson, were not issued in his name; and that 19,798 shares of such stock were issued to Beatty and the blunce balance to other persons.

The new venture did not prove to be a financial success and the corporation went bankrupt. At the time of such bankruptcy, appellant Mohner had \$1750 still due him, A. D. Perry (now deceased) had \$11,387.50 due him, Fred Scherer (now deceased) had \$2841.62 due him, and Nels Fruland had \$8801.84 due him; all upon the purchase price for their sand pits as fixed in the option agreements taken by Johnson.

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This suit resulted, wherein appellants seek to recover their claims on the ground that their properties upon which Johnson took the options, were grossly overvalued and that in consequence, the stock issued therefor, of which Beatty received 19,998 shares, could not be considered as fully paid; and that the act of the corporation in issuing such stock and paying the \$10,000 cash for the options, was fraudulent and in violation of the rights of appellants as creditors of the American Silica Corporation. The bill asked for an accounting to determine the correct value of the stock, and alleged that the stock and cash granted to Johnson for the options on the sand pits was of a much greater value than the options were worth.

Appellants claim to be creditors of the corporation within the contemplation of the trust fund theory. Appelloes contend that the capital stock of the corporation was in no way the basis of any credit extended to it by appellants, or that appellants placed any reliance upon its capital structure; and that appellants' conveyances of their and pits to the corporation were made pursuant to the options they had given to Johnson as Beatty's agent, which appellants allege contained a fictitious, excessive and fraudulent value.

The alleged excessive and fictitious valuations placed by appellants upon their properties constituted the consideration the corporation was to pay therefor, and no doubt served as a basis upon which it peid Johnson. Appellants unje that since such valuations were excessive and fictitious, the act of the corporation in cranting the consideration to Johnson, was a freed upon them as creditors of the corporation.

It is urged by appellees that a trust in favor of creditors of a corporation will not be enforced against stockholders in the manner appellents now seek to do, when the creditors had full knowledge of the arrangement urged as the ground for their recovery. Appellees This south reserved of these constituency appearance of the south of the constituency of the constituency

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To stabiliano ho total al de das a dadă adellație ye began a reinne esta ai escabladice la dasta a lescabale à dasă libra ele further urge that the trust fund theory is intended for the benefit of bone fide creditors of a corporation who have extended credit thereto in reliance upon itsprofessed capital, and has no application to persons who associate themselves with a promoter and a promotion scheme such as we find in this case.

We have set out the theory of appellants and appellees with respect to this case. The cause was heard on stipulation of the parties, and the trial court dismissed the bill for want of equity. Appellants bring this appeal urging for reversal, the ground above indicated.

The briefs of the parties are comprehensive upon their respective theories of the case. We see no good purpose to be served by a discussion or review of the authorities where cited. The question here to be determined is whether the trial court was correct in accepting appellee's theory of the case.

It appears that appellants knew of Beatty's plan to bring the sand pits together under one control and ownership, as was done, when they executed their options to Johnson. Appellants aver that such options were grossly excessive, and fictitious values placed upon their property. When the plan was consummated and the corporation paid Johnson for the options, appellants claim that such payment was in excess of the value of their properties, and therefore a fraud upon them, and that the stock which was issued to Beatty from that paid to Johnson was without consideration, and that Beatty should be held liable for the then value thereff.

It is stipulated that \$1,250,000 was paid by the corporation to the various persons interested in the sand pits (including appellants) and based upon the prices as fixed in the options. Courts cannot mend a bargain because it proves to be improvident or unfortunate. It appears in this case that if appellants were injured, they were the

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is stipulated that (1), 250, 300 was paid by the emporation to ious parsons interessed in the send pits (including acquart respondent to the critical interes accept r

arbiters of their own injuries. A bad bargain cannot be turned into a good one by a subsequent lawsuit.

We are of the opinion that the trial court properly dismissed the bill for want of equity. The decree is therefore affirmed.

Decree affirmed.

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STATE OF ILLINOIS, SECOND DISTRICT	
SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby	
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,	
of record in my office.	
In	Testimony Whereof, I hereunto set my hand and affix the seal of said
App	pellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
hur	dred and thirty
	Clerk of the Appellate Court



40422

HATTIE GABL,

V.

FRANK GABL and ANNA FUNK. Intervening Petitioners.

ANNA FUNK,

Appellee,

V.

HATFIE GABL, Appellant.

APPEAL FROM CIRCUIT

APPEAL FROM CIRCUIT COURT,
COOK COUNTY,

305 I.A. 620

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The only question originally involved in this proceeding was whether Frank Gabl or his wife, Hattie Gabl, was the owner of two first mortgage notes for \$1,700 and \$2,000, respectively, and two separate trust deeds securing same, said securities having been received by Frank Gabl as part of his share of his mother's estate. Hattie Gabl had not been living with her husband at the time he received these securities or for some time prior thereto. After same were delivered to him she returned to live with him as his wife, but left him again some time thereafter. The then attorney for both Frank and Mattie Gabl, who is the attorney for appellant, Mattie Gabl, on this appeal, instituted separate actions in her name on May 31, 1935, to foreclose the aforesaid trust deeds. In each of the foreclosure suits Frank Gabl filed an intervening petition, which alleged inter alia that the note and trust deed involved therein belonged to him and were wrongfully withheld from him by his wife. Hattle Gabl filed sworn answers to the intervening petitions, in which she alleged substantially that she acquired the securities involved as the result of a contract entered into between herself and her husband. Both cases were referred to a master on the issues formed by the intervening petitions and the answers

STAKE.

HATTIE GABL.

FRANK GABE and ANNA FUR Intervening Petitioners

HATTIE GABL,

Appelles

305 I.A. 620

APPRAL PACK CHRUTTY COURT, COUNT COUNTY.

Appellant. MR. PRHEIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The only question originally involved in this proceeding was owi to read Cant Grant Garage wife, Mattle Gail, was the owner or two first mortgage notes for \$1,700 and \$2,000, respectively, and two separate trust deeds securing same, said securities having been esistes a' recitor this areas and to frag as Leb Wart by deviser. sel suit set ta bredaud and this with need ton bad fold elital received these securities or for some time prior thereto. zia as mid dite evil of because and mid of boueries own same tile, but left ats easin your time Controller, Dr Leen evictory for both Frank and Mattle Gabl, who is the attorney for appellant, Mattle Gabl, on this appeal, instituted separate actions in her name on lay 31. 1935, to foreclose the aforesaid trust deeds. In each the foreclosure suits Frank Gabl filed an intervening petition, bevious inter alia that the note and trust deed intervented therein belonged to him and were wrongfully withheld from him by -if of all the call of the same answers and all the call of the call thous, in which she alleged substantially that she acquired the securities involved as the result of a contract entered into between lurself and her husband. Both cases were referred to a master on the figure former by the interesting political and the encore

thereto. On March 27, 1937, by leave of court, Mattie Gabl filed a verified amendment to her answer theretofore filed in each of the foreclosure proceedings, in which amendment without deleting or withdrawing any of the allegations of her original answer she averred that the notes and trust deeds were delivered to her as a gift by her husband, Thus her sworn answers as amended presented two inconsistent (not alternative) versions of the manner in which she acquired title to the notes and trust deeds from her husband. Thereafter Frank Gabl by a written assignment sold, transferred and assigned to his sister, Anna Funk, "his title, right and interest" in all of his personal property, including and specifying the aforesaid notes and trust deeds and two additional notes. Gabl died July 4, 1937, and, his death having been suggested, Anna Punk under her assignment was substituted as intervening petitioner in his place and stead. After a full hearing the master filed his report finding that the assignment of Anna Funk was valid and further finding the issues in favor of the intervening petitioner. A decree was entered in accordance with the findings and recommendations of the master. Hattie Gabl appeals from this decree, assigning as error that said decree is contrary to the law and the evidence.

Anna Funk, the appellee, heretofore filed a motion "to affirm the decree of the court below" because of the failure of appellant to furnish an abstract of the record "sufficient to show the errors relied upon by said appellant, as required by the rules in that behalf." This motion was reserved to hearing. The affidavit filed by the attorney for appellee in support of said motion avers "that he has examined the transcript of the record therein on file in this court, and, has examined the document filed herein as an abstract of that record, and that he knows the contents thereof; that the said document purporting to be an abstract of the record does not contain any abstract of the pleadings in said cause, or any abstract of the master's report, or any abstract of the decree rendered in said cause, or any abstract

thereto. On March 27, 1937, by leave of court, Mattie Gabl filed a out to done at hallt evoluterent rewarms and of thembasms beilitev foreclosure proceedings, in which amendment without deleting or withtend betreve ede general families and to seeingle soft to the adment the motes and trust deeds were they bereviled enew about that a set on edit ton) the surre as a sended presented the incomisted that ed eliti beringes ede delda al remem edi lo encierev (evitenrelle yd Idad irust isesa iro mer her imsband. Insteafter Frank Gabi yd . Totala alm of beggiase bus berreformet , blos trammises meditive a Amma Punk, "his title, right and interest" in all of his personal thook failts has as for blessions eds unbythous one pribulent . Threspore and two additional notes. Gebl died July 4, 1937, and, his death having been ongreshed, anna Youk mades has assignment was solved lates as interventue estitioner in als place and etand, lifter a full burring ZhuT anna lo inemngless edt fedt gniball troper ald belil rejeam edj was voltd and further finding the leader in favor of the intervening A decree was entered in accordance with the findings and recommendations of the maker, dathis Cabl appeals from this decient assigning as error that said decree is contrary to the law and the , sepably a

Anna Funk, the appellee, heretofore, filed a motion "to affirm the degree of the court below" because of the filters of appellant to survish an abstract of the record "curticions to anno the order." Filed upon by and appellant, as required by the rates to the order. This motion as reserved to hearths. The affidivit filed by the attorney for appelles in apport of add notion average. The interior of the transcript of the record therein on file in this court, and, as a maintest the forment filed arrein as an electron of that record, and that as knows the contents thereof; that he will done not use parameters to the record does not contain any contract of the pleadings in the abstract of the objections filed to the master's report, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered in said cause, or any abstract of the degree rendered the said cause, or any abstract of the degree rendered the said cause.

of any documentary evidence offered in said cause; and, that said document omits part of the transcript of the oral testimony given in said cause, and states in altered form the transcript of other oral testimony given in said cause. Affiant further states that said document purporting to be an abstract of the record in said cause is wholly insufficient to present the issues in said cause intelligently to any mind. ****

The attorney for the appellant filed written objections to the allowance of appellee's motion, which stated inter alia "that the affidavit attached to said motion, contains allegations which are far fetched and are without merit, and are made as excuses offered to harass the attorney for the appellant and to confuse the minds of the Monorable Judges of the Appellate Court; that the very purpose of the present practice act on which are based the Rules of the Appellate Court, adopted on April 15, 1937, are to limit long, useless and expensive procedure. followed by large printers bills in briefs and abstracts, and to limit the discussion to novel state of facts, or decide only material questions and issues. or decide new or unsettled questions of practice. Under Rule 1 of the Rules of the Appellate Court the attorney for the appellee could have been diligent, not indolent, and could have directed the Clerk of The Circuit Court of Cook County, Ill., to prepare a praecipe of additional parts of the record, for his own special use, which he failed to do."

Examination of the abstract filed by appellant discloses, as averred in the affidavit filed in support of appellee's motion, that the pleadings and the decree have not been abstracted at all and that the master's report and the objections filed thereto have not been fairly and fully abstracted.

Rule 6 of the Rules of Practice of the Appellate court provides, in part. as follows:

"In all cases, the party prosecuting an appeal in the Appellate Court shall furnish a complete abstract of the record, referring to

of mry documentary evidence offered in said cause; and, that said document outto part of the transcript of the oral testimony given in said cause, and states in altered form the transcript of other oral testimony given in said cause. Iffisht further states that said document purporting to be an abstract of the record in said cause is wholly insufficient to present the issues in said cause intelligently to any mind, when

The attorney for the appellant filled written objections to the Page" and report toruze office ambros a mallages he assessed to affidavia attached to said motion, contains allegations which are for fetched and are without merit, and are made as excuses offered the attorney for the appallant and to confuse the minds of the Homeson a didges of the Local back that the two course to selui suit besed era doldu ao tes esiterro tuesoro adt lo Appolate Court, adopted on April 15, 1937, are to limit long, useless and expensive procedure, followed by large printers bills in briefs and abstracts, and to limit the discussion to novel state of facts, -my to war edicab or describing and issues, or decide mew or unsettled questions of practice. Under Rule 1 of the Rules of the Appellate Court the attorney for the appelles court mays porm dillgent, mot indolent, and could have directed the Clerk of The Circuit efrag Lensifiha to egiseers a prepare to the County and the color county. of the record. for his own special use, which he failed to do."

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[&]quot;In all cases, the party prosecution an appeal in the appellate to rt shall furnish a country abstract of t

the pages of the record by numerals on the margin. Where the record contains the evidence it shall be condensed in narrative form in the abstract so as to present clearly and concisely its substance. The abstract shall be preceded by a complete index, alphabetically arranged, indicating the nature of each exhibit and the page where it may be found, and giving the names of the witnesses and the pages of the direct, cross and redirect examination. The abstract must be sufficient to present fully every error relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision unless the opposite party shall file a further abstract, making necessary corrections or additions. Such further abstract as be filed if the original abstract is incomplete or inaccurate in any substantial part." (Italics ours.)

The abstract filed herein was not merely incomplete and inaccurate as to some substantial part of the record but was incomplete as to every substantial portion thereof.

The appellant completely failed to abstract the essential portions of the record proper in clear violation of Rule 6. The purported abstract did not make a sufficient presentation of either the issues in the case or the errors relied upon for reversal. In discussing the failure of appellant to file a complete abstract in Staude et al. v. Schumacher et al., 187 III. 187, the court said at p. 188:

"The rules of this court require the party bringing a cause into this court to furnish a complete abstract or abridgment of the record, properly indexed, - such an abstract as will fully present every error and exception relied upon, and sufficient for the examination and determination of the case without an examination of the written record. In the case of Gibler v. City of Mattoon, 167 Ill. 18, we said (p. 22): 'It is the duty of parties bringing cases here for review to prepare and file complete abstracts of the record in accordance with the rules, and such abstracts as we can safely rely upon. It is not our duty to perform this work of counsel, which, in detail, as to them is inconsiderable, but when imposed upon us is, in the aggregate, extremely burdensome.'

"The decree must be affirmed for want of complete abstract. ***"

In <u>Hickox v. City of Springfield</u>, 208 Ill. 28, the court said at p. 29:

"Rule 14 of this court requires the party appealing to furnish such an abstract of the record as will fully present every error and exception relied on, and sufficient for the examination and determination of the case without any examination of the written record. Where a manifest attempt has been made to comply with this rule and the abstract is merely defective, it will be accepted by the court as sufficiently presenting the matters in issue, but if the opposing party is not satisfied with such abstract he may file an additional one and have the cost of the same taxed to the party filing the principal abstract, if the court shall finally determine that the additional abstract was necessary. This right of the opposing counsel, however, has never been construed to justify the filing of an abstract which does not pretend

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"The rules of this court require the party bringing a cause record, and it is the court of the court of the court of the couplete abstracts of courses here for review to prepare and file complete abstracts of courses, itself, itse

"The decree must be affirmed for want of complete abstract. ****

In Ficher v. City of Springfield, 203 III. 28, the court said

"Wile 14 of this court requires the party appealing to furnish

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of the court of

to comply with rule 14, and thereby compel the other party to do what the appellant or plaintiff in error should have done. ***

"The judgment of the court below must be affirmed for want of a complete abstract."

appellee's motion was timely, having been filed on November 28, 1938, and it should be considered as of that date. Since we reserved our decision on appellee's motion, she was compelled to file an additional abstract in order to protect her rights in her endeavor to sustain the decree. The additional abstract must therefore be eliminated from consideration in our determination of the question presented by appellee's motion. We are impelled at this time to allow appellee's motion to affirm the decree because the abstract filed by appellant did not even pretend to comply with Rule 6, hereinbefore set forth.

We have, however, notwithstanding that appellent's original and reply briefs are well nigh unintelligible, patiently and carefully read them with as much understanding as they would afford and are of opinion that there is no substantial error in the decree.

The decree of the Circuit court is affirmed for want of a complete abstract.

DECREE AFFIRMED.

Friend and Scanlan, JJ., concur.

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Appellee's motion was timely, having been filed on Movember 28, 1938, and it should be considered as of that date. Since we reserved our decision on appellee's metion, she was compelled to file an additional abstract in order to protect her rights in her endeaver to sustain the decree. The additional abstract must therefore be eliminated from consideration in our determination of the question presented by appellee's motion. We are impelled at this time to allow appellee's motion to affirm the decree because the abstract filed by appellant did not even pretend to comply with fulle 6, hereinbefore set forth.

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The decree of the Circuit court is affirmed for want of a complete abstract.

DECREE AFFIRMED.

Friend and Scenlan, II., concur.

40517

ALLEN INDUSTRIES, Inc.

Appellant,

V.

AMERICAN HAIR & FELT COMPANY, a corporation, Appellee.

APPEAL PROM CIRCUIT COURT,

305 I.A. 621

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Allen Industries, Inc., against defendant, american Hair & Felt Company, to recover damages for breach of an oral contract alleged to have been made in November. 1935, for the sale by defendant to plaintiff of 3,750,000 pounds of felting hair, approximately 25% of which was to be delivered in each of the four quarters of 1936. With its answer defendant asserted a counterclaim for the invoiced price of divers shipments of hair made by it to plaintiff. In its reply to the counterclaim plaintiff admitted its indebtedness to defendant for the amount claimed therein but alleged as the reason for the nonpayment of same defendant's liability for breach of the contract pleaded in the complaint. After a trial by the court without a jury the issues were found in favor of defendant both on its counterclaim and on plaintiff's complaint, Damages of \$25,945.53 (including interest) assessed against plaintiff on the counterclaim were paid by it in open court. Judgment was entered in favor of defendant and against plaintiff on the latter's complaint and the amendment thereto. This appeal seeks to reverse that judgment.

Plaintiff's complaint as originally filed alleged substantially that an oral agreement between the parties was entered into by their respective presidents, Allen and Wilde, on November 5, 1935, under the terms of which plaintiff agreed to purchase and defendant agreed to sell 3,000,000 pounds of cattle hair and 750,000 pounds of calf hair

COMPANY AND ADDRESS OF THE PARTY AND ADDRESS O CONTROL SOURCE 305 L.A. 621 . BOX Diversi

MR. PHESIDING JUSTICE SULLIVAN DELIVERED THE OFFICE OF THE COURT.

This action was brought by plaintiff, allon Industries, Inc., against defendant, American Mair & Felt Company, to recover demeases and a rest of an oral contract alleged to have mede in Movember. 1935, for the sale by defendant to plaintiff of 3,750,000 pounds of felting hair, approximately 25% of which was to be delivered in each of the four quarters of 1936. With its enswer defendent assertes counterclaim for the invoiced price of divers shipments of his made by it to plaintiff. In its reply to the counterclaim plaintiff miscoult femials tures and to defendant for the cases the best and but alleged as the reason for the nonpayment of same defendant's liability for breach of the contract pleaded in the complaint, After a trial by the court without a jury the issues were found in favor of defendant both on its counterelaim and on plaintiff's complaint, Tism to sanion housest (servent activities) Eggs to be a recommon on the counterelaim were paid by it in open court. Judgment was at restal and no Tilinials states and against on the latter; complaint and the amendment thereto. This appeal seeks to reverse that judgment.

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for delivery in 1936, 750,000 pounds of cattle hair and 187,000 pounds of calf hair "to be ascribed to, and as near as might be delivered in" each quarter of 1936: that a price of 6-1/2 cents a pound was thereupon agreed to for the hair ascribed to the first quarter and that "the price of the hair to be delivered during the succeeding quarters of the year 1936 should be such/as was thereafter agreed to between the plaintiff and the said defendant;" that the hair ascribed to the first quarter was delivered and paid for: that plaintiff and defendant agreed on April 28. 1936, that the price for the 937,000 pounds of hair ascribable to the second quarter should be 7-1/2 cents a pound and that said hair was delivered and paid for at the agreed price; that August 26, 1936, plaintiff and defendant agreed "that the price of the hair ascribable to the third and fourth quarters of the year 1936 should be 7-1/2 cents per pound," and that the hair ascribable to the third quarter was delivered; that on November 24, 1936, defendant refused to deliver the hair "ascribed to the fourth quarter" and thereby breached its contract; that plaintiff was obliged to purchase the amount of hair ascribable to the fourth quarter in the open market at a price of 5 cents a pound in excess of the price of 7-1/2 cents a pound stipulated by the parties in the agreement of August 26, 1936, and that by reason thereof plaintiff was damaged to the extent of \$50,000; that an unpaid balance of \$24,140 remained owing by plaintiff to defendant for hair delivered by it, which was ascribable to the third quarter; and that plaintiff offered to allow this amount as a set-off to the damages claimed by it.

Defendant filed a verified answer which denied the agreements alleged in the complaint to have been entered into by the parties on November 5, 1935, and on August 26, 1936, but admitted that an oral agreement was entered into in November, 1935, under the terms of which defendant was to ship 937,000 pounds of hair to plaintiff at a price of 6-1/2 cents a pound during the first quarter of 1936 and that that quantity of hair was delivered by defendant to plaintiff and paid for by the latter at the agreed price. The answer then

elleged in the contract to into an authorized in the process of the contract to the contract the contract that contract a pound during the first quarter of 1936 and that that quantity of hair was delivered by desendant to plaintiff and that that quantity of hair was delivered by desendant to plaintiff and paid for by the latter at the agreed price. The enewer then

averred that the oral agreement alleged to have been entered into by the parties on movember 5, 1935, did not create a valid and binding contract because by its very terms the price of the hair was left open to be later agreed upon between the parties; that on april 28, 1936, the parties entered into a written agreement with respect to the sale of hair by defendant to plaintiff for the second three months of 1936, said written agreement setting forth the quantity, quality, price and terms of delivery; and that on July 22, 1936, the parties entered into a written agreement with respect to a sale of hair for the third three months of 1936, which specified the quantity, quality, price and terms of delivery. The answer included a plea of the Statute of Frauds.

Defendant filed with its answer a counterclaim for \$24,140, the amount which plaintiff's complaint admitted to be due and owing. The counterclaim pleaded the written agreement of July 22, 1936, relating to the hair sold for delivery during the third three months of 1936 and averred that all the deliveries for that quarter had been completed and that invoices for some of the shipments totalling \$24,140 had not been paid. Plaintiff filed a verified answer to the counterclaim, which in substance restated and realleged the averments of its complaint.

This was the state of the pleadings when the case went to trial.

After Sidney J. Allen, president of plaintiff company, testified that the alleged oral contract of Movember 5, 1935, which was made in Pennsylvania and to be performed in Michigan, provided for the delivery of hair for the entire year 1936, defendant, upon leave granted, filed an amendment to its answer, in which it pleaded the Statute of Frauds of each of said states.

After the close of all the evidence plaintiff over defendant's objection obtained leave to file and did file an amendment to its complaint. This amendment deleted from the original complaint the allegation that the parties agreed orally on August 26, 1936, "that the price of the hair ascribable to the third and fourth quarters of the year 1936 should be 7-1/2¢ per pound" and substituted therefor an

averred that the oral agreement alleged to have been entered into by the parties on lovember 5, 1935, did not create a valid and binding contract because by its very terms the price of the hair was left open to be later agreed upon between the parties; that on April 28, 1936, the parties entered into a written agreement with respect to the sale of hair by defendant to plaintiff for the second three months of 1936, said written agreement setting forth the quantity, quality, price and terms of delivery; and that on July 22, 1936, the parties entered into a written agreement with respect to a sale of hair for the third three months of 1936, which specified the quantity, quality, price and terms of delivery. The answer included a plea of the Statute of Frauds.

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Defendant filed with its enswer a countercleim for 524,140, the amount which plaintiff's complaint edmitted to be due and owing. The accumulation of the country during the third three months of 1936 and averred that all the deliveries for that quarter had been completed and the interior for that quarter had been completed and the interior for the completed and the interior for the completed and the interior for the contract of the confidence of the confidenc

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averment that in the alleged oral contract of Lovember 5, 1935, the parties agreed that the price of hair for the last three quarters of 1936 "should be the average price paid by the defendant to tanners for hair of such kind and quality plus 1¢ per pound." Defendant's motion to strike the amendment to the complaint having been denied it filed a verified answer denying the allegations of said amendment and also pleaded the Statute of Frauds to the complaint as amended.

Plaintiff's theory as stated in its brief is "that the proofs established a contract by defendant to sell to plaintiff 3,750,000 pounds of hair, substantially one-fourth to be delivered in each of the four quarters of the year 1936, at a price of 1¢ in excess of the price paid by defendant to tanners for such hair; that the contract could have been fully performed within the space of one year from the time it was made; that defendant repudiated the contract in respect of the quantity allocable to the fourth quarter and that plaintiff was obliged to buy on the open market such quantity at prices about 4¢ over that determined by the contract."

Defendant's theory is that no contract or agreement was made in respect to the fourth quarter of 1936, which is the only period in controversy, and that the oral agreement alleged by plaintiff to have been entered into in November, 1935, if made, was void under the Statute of Frauds.

The primary question presented for our determination is whether the finding of the trial court that there was no contract or agreement made by the parties in respect to the fourth quarter of 1936 was manifestly against the weight of the evidence.

Plaintiff is a manufacturer of hair products - chiefly felt for various uses. Its plant is located in Detroit. Defendant, whose headquarters are in Chicago, is one of the largest dealers in hair, as well as a manufacturer of hair products which are competitive with those of plaintiff. On May 5, 1933, plaintiff by its written order made its first purchase of felting hair from defendant for

averment that in the alleged oral contract of November 5, 1935, the parties sgreed that the price of hair for the last three quarters of 1936 "should be the average price paid by the defendant to tanners for hair of such kind and quality plus 14 per pound." Defendant's motion to strike the amendment to the complaint having been depied it filed a verified answer denying the allegations of said amendment and also pleaded the Statute of Frauds to the complaint as amended.

Plaintiff's theory as stated in its brief is "that the proofs established a contract by defendant to sell to plaintiff 3,750,000 pounds of hair, substantially one-fourth to be delivered in each of the four quarters of the year 1936, at a price of 1¢ in excess of the price paid by defendant to tenners for such hair; that the contract could have been fully performed within the space of one year from the time it was made; that defendant reguliated the contract in respect of the quantity allocable to the fourth quarter and that plaintiff was obliged to buy on the open market such quantity at prices about 4¢ over that determined by the contract."

isfendant's theory is that no contract or agreement was made in respect to the fourth quarter of 1936, which is the only period in controversy, and that the oral agreement alleged by plaintiff to have been entered into in Movember, 1935, if made, was void under the Statute of Frauds.

The primary question presented for our determination is whether the the contract or agreement made by the parties in respect to the fourth quarter of 1936 was manifestly against the weight of the evidence.

Plantif is a surface of the course - which; felter various uses, Its plant is located in Detroit, Defendant, whose heady that are in duit to, i one of the interest of the products which are competitive with the of the interest of heir products which are competitive with the of the interest of the products which are competitive with the of the interest of the inter

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delivery during the year 1934. On November 22, 1934, again by its written order, plaintiff purchased from defendant 3,000,000 pounds of hair (subsequently raised to 4,000,000 pounds) at 3-3/4 cents per pound, to be delivered in "approximately equal monthly shipments between January 1, 1935, and Docember 31, 1935." The defendant was behind in its deliveries under the contract covering 1935 and by written agreement of the parties on October 10, 1935, the time for the delivery of the hair necessary to complete the contract for that year was extended so that defendant might "make shipment as soon as possible after January 1." All of the hair covered by the contract for 1935 was shipped by the end of February, 1936. Apprehending that the supply of hair would not be sufficient to meet the demand in 1936, a meeting of a number of the leading hair dealers and manufacturers of hair products was called and held at the Bellevue Stratford Motel in Philadelphia on November 13, 1935, to discuss the raw material outlook for the coming year, the probable needs of the manufacturers and the means of supplying same. At such meeting plaintiff was represented by its President, Sidney J. Allen. Defendant was represented by its president, Theodore Wilde, and by the Chairman of its Board, V. A. Wallin. There were also in attendance Victor Memphill, President of Memphill & Company, a dealer, J. J. Densten, President of Densten Hair & Felt Company, a dealer as well as a manufacturer, and Theodore Horwich, Secretary of the General Felt Products Company of Chicago. The concerns represented at the meeting were the principal users and suppliers of hair in this country. All those who participated in the Philadelphia conference testified in this cause except Memphill, who died shortly before the trial.

Concerning what transpired at the Philadelphia meeting, Allen, plaintiff's president, testified that Mr. Wilde said "the consumption of hair was increasing beyond the production of the hair and it would be to the interest of the individuals to collectively get together and buy our hair together through one particular group, and also to regulate the amount of hair each of the manufacturers would consume during the

dollvery during the year 1934. On Rovember 22, 1934, again by its weitten order, plaintiff purchased from defendant 3,000,000 pounds of heir (subsequently reised to 4,000,000 pounds) at 3-3/4 cents per pound, to be delivered in "approximately equal contbly shipmonts between January 1, 1935, and December 31, 1935." The defendant was bas Till gainevoo toentace sai robau seinevileb ett at balded written agreement of the parties on October 10, 1935, the time for tha delivery of the hair mecessary to complete the contract for that year eldizzog as noce as imeminis eleminis ingin ingleto fant ce bebreites ewe after January 1." All of the hair covered by the contract for 1935 was shipped by the end of Pobrucry, 1936. Apprehending that the supply aniteon a total not be sufficient to meet the demend in 1936, a meeting of a number of the leading hair doelers and manufacturers of hair products was called and held at the Bellavue Stratford Hotel in Medito Live on war and adventure to the control of for the coming year, the probable needs of the manufacturers and the means of supplying some. At such meeting plaintiff was represented by its President, Sidney J. Allen. Defendent was represented by its president, Thoses will be the chairmen of its Thoses, a.v. buson the Thoses Wallin. There were also in attendance Victor Norphill, President of Hemphill & Company, a dealer, J. J. Densten, Fresident of Donsten Hair & Felt Company, a dealer as well as a manufacturer, and Theodore Morwich, Secretary of the General Felt Products Company of Chicago. The concerns represented at the meeting were the principal more and suppliers of hair in this country. All those who participated in the Philadelphia conference testified in this cause except Hemphills who died shortly before the trial.

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following year; " that Milde and Densten stated how much hair they would need; that these amounts were compared with the production anticipated for the following year; that wilde and horwich said that they would pare down their production for the following year and that he [Allen] stated that he would do likewise; that he said plaintiff would be content with approximately 6,000,000 pounds; that Wilde said that his company would undertake to deliver 3,000,000 pounds of brown cattle hair and 750,000 pounds of calf hair to plaintiff; that Hemphill said that his company would furnish 1,000,000 pounds of cattle hair and 500,000 pounds of goat hair; that Densten said that his company would furnish 1,000,000 pounds of hair, giving plaintiff approximately 6,000,000 pounds; that "they would furnish, sell us, sell our company that amount of hair *** the price to be determined quarterly, le per pound differential above that which they paid the tanners, le average price, which they paid the tanners;" that "Ar. Morwich of the General Felt Company and myself said that we would like to have determined the exact price of the hair:" and that he [Allen] asked "what the price of hair would be for the first quarter;" that "Mr. Wilde said that the price to the tanner at that time was 5-1/2¢ a pound *** the price to us would be for the first quarter o-1/26;" and that Mr. Milde stated that "they would give us 3,000,000 of brown medium and short brown cattle hair and 750,000 pounds of calf hair *** all domestic cattle hair."

Theodore Norwich testified in plaintiff's behalf that he said at the Philadelphia meeting that his company would use less hair in 1936; that he stated that his company would get along with 4,000,000 pounds; that Hemphill said "that he would sell them 1,000,000 pounds" and Wilde said "that he would sell them 3,000,000 pounds;" that "the same people said they would sell allen a quantity of hair to be delivered in 1936," but that he did not recall what the quantity was; that "the price was to be 1¢ a pound above their cost *** the same basis as it was sold to us; "that Wilde, Densten and Hemphill said that "the prices were to be determined quarterly;" and that the price for the

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Year that deum word herate netated has oblit that "greet galwolle" would need; that these amounts were compared with the production Intl the delign to the tell of the principle of the last beautiful that the resy and clicit or not not reduction and busy start that Talinialy bias on tant; estiments of bluow of tant betata [mella] on would be content with approximately 6,000,000 pounds; that wilds said tinet his company would undertaine to deliver 3,000,000 pounds of brown and principle as well to or almost occupied with the state of signs to among 300,000; I detruit thes you made all fault blas lilegant vicames the that the contact that Densten suit that he some pour that gloundatoryge thinking writer, that to shown you will approximately one connect the transfer of the connection of th that assumt of hair was the price to be determined quarterly. It ser pound differential above that which they paid the tanners if average price, which they paid the tanners:" that "her horwich of the General Folt Company and myself said that we would like to have determined the To soing and Janu being [mallia] and Jani bur "riad out to soing Joans hair would be for the first quarter;" that "Mr. Wilde said that the price to the tanner at that time was j-1/in a pound were the price to us would be for the first quarter o-1/24;" and that ir, wilde stated mord from bus suitem mord to 000,000, as evin bluow year fait cattle hair and 750,000 pounds of calf hair *** all domestic eatile

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"first quarter was to be 6-1/2¢."

wilde, testifying in descudant's behalf, denied that he agreed orally with allen that defendant would sell to plaintiff 4.750.000 pounds of hair, one quarter of which was to be delivered in each of the four quarters of 1936 and that the price of such hair for the last three quarters of 1936 was to be 1 cent over the average price paid by the defendant to tenners for hair of such kind and quality. He testified that allen requested an agreement of that kind but that he told him he would not make such a commitment; that he would, however, agree to sell the 937,000 pounds of hair, which allen requested for the first purter, at 6-1/2 cents a pound. He further testified that he told Allen, "The American Sair & Felt Company would make every endeavor to supply their customers, including Allen Industries and General Felt, their requirements, but unless they received enough hair for their own requirements as well as for all of their customers including allen Industries and General Felt they could not sell any quantities except what we promised to give them verbally for the first three months of 1936 and the balance we still owed allen Industries on the 1935 contract *** I said that any further quantities and prices would have to be set on or after the 1st of April, the 1st of July, and 1st of October of 1936."

John J. Densten, President of the Densten Felt & Hair Company, testified that he attended the conference in Philadelphia; that "the conversation went on as to what the possible requirements might be for the parties there for their manufacturing purposes for the year 1936 *** and each one submitted an estimate of what their possible requirements would be; "that Allen said "he would require approximately six and a half million pounds of hair, brown hair; "that "it was estimated that the production for 1936, considering inventories, that the available supply would be less in 1936 than it was in 1935; and everybody agreed under the circumstances to be satisfied with a lesser amount for 1936 than they had in 1935; and that was agreed upon *** as to price, of course we could only be approximate, and very indefinite; however

"first quarter was to be 6-1/24."

Wilde, testifying in defendant's behalf, danied that he agreed 000 007 7 Thishield of Lies bloom thebraich tadt mella dithy yllaro pounds of hair, one quarter of which was to be delivered in each of the four guarters of 1936 and that the price of such hair for the last three quarters of 1956 was to be 1 cent over the average price paid by the defendant to tenners for bair of such kind and quality. He testified that Allen requested an agreement of that kind but that he told him he would not make such a commitment; that he would, however, agree to sell the 937,000 pounds of hair, which allen requested for the first quarter, at 6-1/2 cents a pound. He further testified that he told illen, "The imerican Hair & Felt Company would make every endoavor to supply their customers, including Allen Inquetries and General Falt, their requirements, but unless they received enough hair for their own requirements as well as for all of their customers including allen Industries and Concrel Welt they could not sell any tark't ent not viladrev medt evir of backmore ew tadw teesne zoititmaup three months of 1936 and the belance we still owed Allen Industries on assing bas asittinaup restaut you that blue I was teerinos digi and regulation of the set all the set of the lat of the lat of the lung. and let of October of 1936."

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there was a definite price set for the first three months of the year:" that "we said "e would supply him [allen] with a million pounds of cattle hair and two hunared and trenty-five thousand pounds of goat hair *** we said that the price would be 6-1/20 for the first three months of the year, for 25% of that quantity upon the cattle hair and 5-7/40 on the goat hair, for 25.0 of that quantity;" that he did not hear any conversation as to the quantity of hair that defendant would endeavor to furnish to plaintiff during 1936; that he heard nothing said between allen and kilde as to price "excepting general conversation;" that "prices were not being fixed for anything except the first quarter; that he furgished claimtiff with hair during the first three months of 1936 - "25% of what we sold him for the year" at a price of "6-1/2d for the cattle hair and 5-3/4d for the goat hair;" that his company did not sell or deliver to plaintiff any hair after the first three months; and that "we set our prices for the second quarter but he [Allen] would not agree to it *** we just did not ship."

On examination by the trial judge Densten testified that "while he, Wilde and the others were present - future requirements had been talked about - something was said by Wilde or Allen concerning the price of the hair being based upon a differential of l¢ over that paid us to the tanners;" that that was said "at the time they were trying to figure out what the price would be at the beginning of the year and it was agreed that a legitimate price for the other manufacturers to pay, if they were not buying directly from the tanner, would be l¢ per pound differential as between what any of us paid the tanner and the f.o.b. price Detroit;" that "Allen paid them l¢ over the tanner's price that existed in January of 1936;" that the differential of 1 cent "was bearing on the whole year;" that "what was said was that we would go along on that basis for the first three months of the year and any price situation or anything else that came up during the first quarter would be readjusted at the beginning of another quarter."

V. A. Wallin, who attended the meeting in Philadelphia and who was at that time the Chairman of the Board of Directors of defendant,

there was a definite price set for the first three months of the year:" that "we said we would supply him [allen] with a million pounds of teeg to chang basesoft evik-vines but bethus two that right elites serif farif end tol \$1/1-0 ed bluow seing and fent bles ow www mind menths of the year, for 15% of that quantity upon the cattle had and 5-2/44 on the goat hair, for 25% of that quantity; " that he did Susbneled ladi tied to the contity of an noiterevence yes teen ton breed ad Jady : 0291 unitab Thinisly of Maintel of Tovachee bluow mething anid between Allen and Wilde as to price "excepting general justion;" that "prices were not being lard for anything exception out garres that dist Thinks bedsimmed of Jedy tour sout edf "tree cut not mid bloc ow take to MES" - deel to edition send terif at a price of "6-1/24 for the cattle hair and 5-3/44 for the goat hair;" ed reits ried yes thinkely of review to the jon bib yesquee aid jadj retrang brosse out for aspire was see was test brosses when the trail ache tem did faut ew *** the of eers for bluew [mella] en tud

On examination by the trial judge bensten testified that "while he, Wilde and the others were present - fature requirements had been talked about - something was said by Wilde or Allen concerning the price of the hair being based upon a differential of 16 over that paid us to the tanners;" that that was said "at the time they were trying to figure out what the price would be at the beginning of the year and it was agreed that a legitimate price for the other manufacturers to pay, if they were not buying directly from the tanner, would be 16 per pound differential as between what any of us paid the tanner and the f.o.b. price Detroit; "that "Allen paid them 16 over the tanner's price that existed in January of 1936;" that the differential of 1 cent "was bearing on the whole year; "that "what was said was that we would go along on that basis for the first three months of the year and any price situation or anything else that came up during the first quarter would be readjusted at the beginning of another quarter."

V. A. Wellin, who attended the meeting in Philadelphia and who was at that time the Chairman of the Board of Phreetors of defendant,

testified "that Mr. Wilde said that he could not guarantee a large quantity or any quantity for the year 1935, he had his own mills to supply, that he had other customers to take care of and declined to promise the definite large quantity that Mr. Allen wanted to secure from him;" and that "as soon as they began talking price I said to them, 'now, I am not concerned in the price. I am not concerned in quantities. I won't sit in with you on this price situation because I don't know anything about it' *** and these buyers and sellers went into a corner of the room and discussed prices *** I was not a party to that discussion and don't know what the prices were."

As heretofore stated defendant was not able to complete the shipments required under the 1935 contract until the end of February. 1936. Defendant then began to make shipments of the 937,000 pounds of hair it agreed to furnish plaintiff for the first quarter of 1936. Shortly thereafter difficulties arose regarding the slowness of deliveries and the grade of hair delivered. As a result Allen came to Chicago april 28, 1936, and a meeting was held at defendant's office, at which were present allen, ilde and Thomas It. Jones, Manager of the Mair Division of defendant. At this meeting samples of hair were examined and the grale of hair to be delivered in the remaining shipments for the first three months of 1936 agreed upon. At that time an agreement was also entered into between the parties for the sale of 937,000 pounds of hair to plaintiff at a price of 7-1/2 cents a pound for the second three months of 1936. The exact terms of this agreement were specified in the following letter of April 28, 1936, from defendant to plaintiff and plaintiff's reply thereto of April 29, 1936:

"Mr. Sidney J. Allen, President, Allen Industries, Inc., Detroit, Michigan.

Dear Mr. Allen:

testified "that it, wilds said that he could not guarantee a large quantity or any quantity for the year 1936, he had his own mills to supply, that he had other customers to take sure of and declined to promise the definite large quantity that hr. Allen wanted to secure from him;" and that "as soon as they began talking price I said to them, 'now, I am not concerned in the price. I am not concerned in the price. I am not concerned in with you on this price situation because I don't know anything about it! *** and these buyers and sellers went into a corner of the room and discussed prices *** I was not a party to that discussion and don't know what the prices were."

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[&]quot;r. Tidor, d. Leon, woldent, Allen Industries, H)., Detroit, Michigan.

Dece No. Allows

As arranged when you were here today, we are to book you for:

750,000 lbs. Hair 187,000 " "

937.000 lbs.

To be shipped during the second quarter of this year. We still owe you on account of Hair which should have been shipped you in the first quarter

What we sold you of Foreign Hair today and what we are reserving for you of that kind aggregate

460,000

500,000 lbs. 397.000

The prices to apply are as follows: We are to ship you at once - 160,000# Foreign Hair To be shipped from time

to time - 300,000# Domestic "
460,000# 6 1/2¢ lb.
(To complete shipments for the first quarter)
On the 340,000 lbs. Foreign which we are
to ship you at the rate of one carload of
Foreign to two carloads Domestic - and On the 597,000 lbs. Domestic 7 f.o.b. cars Detroit in full carload lots. 7 1/2¢ 1b.

If for any reason we cannot complete shipments by the end of the second quarter, we are to ship the balance as soon as possible thereafter.

Please acknowledge.

Yours very truly, American Hair & Felt Company."

"American Hair & Felt Co. Chicago, Ill.

Gentlemen:

We are in receipt of your letter of the 28th and wish to advise that everything in your letter corresponds with Tr. Allen's understanding except the pomestic Mair is to be all Brown Cattle and samples are to be submitted to us for approval.

> Yours very truly, Allen Industries, Inc."

On July 2, 1936, Allen wrote Wilde the following letter:

"Mr. T. Wilde, American Hair and Felt Company. Chicago, Illinois.

Dear Ted:

We are very much interested in knowing what your intentions are in regard to the hair situation for the third quarter.

We are desirous of getting settled on this item at your earliest possible convenience.

With kindest regards, I am

Very truly yours, Sidney J. Allen, President."

is arranged when you were here today, we are to book you for :

756,000 lbs. Mair 187,000 " "

\$37,000 Shirt

No be shipped during the second quarter of this year, He Till owe you on account of mend would bisoris stolkly wish wad while the little out that won bought he

mini an income to more from our dealer privated was a faile but pabor CONTRACT CONTRACT OF ANY SOL

QQQ, Q&A LE SAL BOOM

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The prices to apply are as follows: We are to ship you at once - low, 000% Foreign Hair emit mouli bauqida ad o'

Domestie " 00.00F - only of (To complete shipments for the first querter)

On the 340,000 lbs. Poretan which we are to handwar and to him and ra how other or buts - of med about an own of med you 7 1/25 lb.

on the 597,000 lbs. Demestic 7.0.b. cars Detroit in full carload lots.

If for any reason we sample sometimes shipments by the end on the second results of the second results among and be possible theresider,

Alveste en marylodies.

Yours very truly,

userican Hair & Felt Co. liesgo, Ill.

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The specific of your Leving at Jan 1870 and will be miving that everything in your latter personned with at allowing and samples are to be submitted to us for approval,

Yours very truly, Allen Industries, Inc."

on bull i, 1930, lines whose wiles one following levents

"IT. T. Wildes American Hair and Felt Company, Chicago, Illinois, ...

Dear Tedt

amilynoing way have adressed at hejstwidth down they, our on are in regard to be bett attualle for the built quarter.

The are destrous of getting settled on this item at your earliest measible convenience.

we I abrayer recental ditw

Very truly yours, the boundary,"

Pursuant to this letter a conference was arranged in Chicago On July 22, 1936, between Allen and wilde, the result of which was recorded in the following correspondence between the parties:

"July 22, 1936.

Mr. Sidney J. Allen, President, Allen Industries, Inc. Detroit, Michigan.

Dear Mr. Allen:

As per our conversation in this office today, we have booked your order for

750,000 lbs. Cattle Hair and

187,000 " Calf Hair Total

Total

737,000

to be shipped to you in the third quarter of 1936 at a price of f.o.b. cars Detroit, in full carload lots.
We still owe you

294,406 lbs. Domestic Hair

and

107.317 lbs. Foreign Hair

which is the balance due on contract made with you as per our letter of April 28, 1936.

It is further understood that if for any reason we cannot complete shipments by the end of the third quarter of the above specified quantities, we will ship the belance as soon as possible thereafter.

Will you please acknowledge this letter? Very truly yours, T. Wilde President American Hair & Felt Company."

"July 23. 1936.

Mr. T. Wilde, American Hair and Felt Company, Chicago, Illinois.

Dear Ted:

Thanks very kindly for the courtesies extended to me yesterday.

We wish to confirm your letter of the twenty-second, and according to the writers understanding the 750,000 pounds of cattle hair is to be brown domestic hair.

With kindest personal regards, I am Very truly yours, Sidney J. Allen, President."

In August, 1936, plaintiff made a series of complaints regarding shipments of foreign hair and as a result of said complaints Wilde conferred with Allen at the latter's office in Detroit on August 26.

Pursuant to this letter a conference was arranged in Chicago On July 22, 1936, between Allen and Wilde, the result of which was recorded in the following correspondence between the parties:

"July 22, 1936.

r, Sidney J. Allen, President, llen Industries, Inc.

Doer Mr. Allen:

besicod evad a vale estite in this effice today, we have besied

750,000 lbs, Cattle Neir

bus

187,000 " Calf Matr

f.o.b. cars Detroit, in full carload lots.

294,406 lbs. Bomestic Hair

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107, 137 the Terelen hale

endon is the indicate due as scatters cale sits you on per our latings of April 5, 1910.

It is further understood that if for any reason we earnot

Sill you please acknowledge this letter? Very truly yours,

Incolours

Paragust first a will meeting

"July 23, 1936.

T. "11de, in Heir and Felt Company, Chicago, Illinois,

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Mith Mindest personal regards, I am Very truly yours, I am

In August, 1936, plaintiff made a sories of complaints regard-

1936. As will be hereafter shown this Detroit meeting of August 26, 1936, furnished in large measure the basis of plaintiff's original complaint.

There is a direct conflict in the testimony as to what actually occurred and as to what was said by those present at the meeting in Philadelphia in Lovember, 1935. The testimony of allen is contradicted in all material respects by the testimony of wilde. Hen stated that he and side entered into an oral agreement at said meeting that defendant would furnish plaintiff 3,750,000 pounds of hair during the year 1936, 937,000 pounds of which would be ascribable to each quarter of said year at a price of 6-1/2 cents a pound for the first quarter, the price for the succeeding quarters to be "the average price paid by defendant to tanners for hair of such kind or quality plus 1¢ per pound." On the other hand Wilde testified that the extent of his oral agreement with allen at the Philadelphia meeting was that defendant would deliver to plaintiff 937,000 pounds of hair during the first quarter of 1936 at 6-1/2 cents a pound.

In substantiation of his claim that the price fixed by the parties in the alleged oral agreement for the year 1936 was one cent per pound above the average price paid by defendant to tanners for the last three suarters of the year Allen testified that on the occasion of his conference with Wilde on April 28, 1936, in defendant's office, "I asked Mr. Wilde what the price of hair would be for the second quarter. Mr. Wilde called in somebody from the bookkeeping department, and in front of me, asked them what the average price was that they were paying at that time from the tanners. The bookkeeper his name I do not know - stated they were paying six and one-half cents per pound. Mr. Wilde in turn gave us a price of seven and onehalf cents per pound/for our second quarter." He testified further that at the conference between himself and Wilde on July 22, 1936, when the contract was made for the sale of hair by defendant to plaintiff for the third quarter of 1936, "I again inquired the price on it for the third quarter. Mr. Wilde stated there had been no

1936. is will be hereafter shown this Detroit meeting of August 26, 1936, furnished in large measure the basis of plaintiffs original complaint.

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ent yd benit estag ont fant misle sin to mottattastadus mI thes and as differ any out for the parties and a self as To' aroma; of fachaled by blad this engrees out evode bayon teg ed to the quarters of the year Allen testified that of the occasion of his conference with Wilde on April 23, 1936, in defendant's office, "I asked Mr. Wilde what the price of hair would be for the second quarter. Mr. Wilde called in somebody from the bookkeeping asw spire ogereast the me, asked them whit the everege price that they were paying at that time from the tenners, The bookkeeper -Tied-one but his guiyed elem yedd befeft - word fun ob I sman sid cents per pound. Mr. Milde in turn gave us a price of seven and onseon hair outs yet won from our second quarter." He healfiled for the that at the conference between himself and Wilde on July 22, 1936, when the contract was made for the sale of hair by defendant to similar for the third quarter of 1936, "I again involved the selecan it for the tain's quarter, let, this ship that Core had seen no

change in the tannery price, and the price would be seven and onehalf cents to me for the third quarter.

Milde, testifying in reference to the conversation between himself and allen on April 28, 1936, stated that he did not acall in anyone and ask them what the price was - what prices were being paid to tanners; that no one came in and told him in that conference that the price being paid to tanners was 6-1/20," but that he did agree with Allen at that conference that the price for the second quarter would be 7-1/2 cents. He also testified that in the conference with Allen on July 22. 1976, which culminated in the contract to furnish plaintiff with hair for the third quarter, he discussed with Allen "the hair situation in general, the acute shortage of hair, also further sale to him of 937,000 pounds of cattle and calf hair at a fixed price of 7-1/24;" that he did not tell allen on that occasion "that there had been no change in the price to tanners and the price would be 7-1/2¢; that "I only told him the price was 7-1/2¢ per pound *** I did not tell him that the price to the tanners was b-1/24," and that Allen did not inquire "what the price to the tanners was."

The testimony of Densten and Morwich corroborated that of Allen to some extent as to the general trend of the conversation at the Philadelphia and meeting, both in respect to the agreement made there being for the year 1936 and in respect to the price to be charged for the hair for the last three quarters of that year. Mowever, Densten, Morwich and Wallin all testified that they did not know what ctual agreement was reached between Allen and Wilde.

In view of the sharp conflict in the testimony of the witnesses, the documentary evidence in the record unquestionably became a decisive factor with the trial court in its consideration and determination of the factual issues presented. "There there is such a direct conflict in the oral testimony, documentary evidence, like the correspondence between the parties, becomes of paramount importance. Such evidence, if pertinent, is controlling, since it is the best evidence and in every way more satisfactory and convincing than the recollection of

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witnesses as to conversations which occurred more than two years before." Toppan v. McLaughlin, 120 Fed. 705.

Subsequent to the meeting in Philadelphia in Movember, 1935, plaintiff or Allen forwarded fifteen letters to Wilde or defendant concerning hair purchased by plaintiff from defendant for delivery in 1936 and in not a single one of them is there any reference made to the oral agreement claimed by plaintiff to have been entered into with defendant covering the purchase and sale of hair for the entire year 1936. Meither was any reference to a contract covering the year 1936 contained in any of the eleven letters in the record from Wilde or defendant to allen or plaintiff. Even in the letter written by allen to Wilde on Movember 25, 1936, which marked the break in the relations between the parties, there is not even a suggestion of an agreement covering the entire year. The following passage is found in this letter:

"On August 26th, you visited our office and explicitly stated that due to market conditions you could not reduce the price of hair for the last quarter and would continue on the same basis of price which you were then furnishing us, namely, 7-1/2 per pound.

"Does it seem possible to you that we would wait until the last month of the last quarter of the year to a termine a price for the last quarter shipments."

The foregoing language indicates that plaintiff placed its dependence for its supply of hair for the last quarter of 1936 at 7-1/2 cents per pound upon the asserted agreement of August 26, 1936, rather than upon the alleged oral agreement for a year, which it now contends was entered into by the parties at the meeting in Philadelphia in November, 1935. Wilde's reply of November 27, 1936, to Allen's letter of November 25, 1936, is in part as follows:

"Under no circumstances have I ever gone on record to assure you hair for the last quarter of 1936 and stipulated a price at which the hair would be delivered to you. It is entirely out of the question that, as you state, on August 26th I would have been in a position to quote you a price that would be effective on or after October 1st. Conditions at that time certainly did not warrant us in setting a price so far ahead."

There certainly is nothing in the language used by Wilde in this letter to indicate that defendant felt that it was burdened with a contract to deliver hair to plaintiff during the last quarter of 1936.

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Wilde's letter to Allen of April 28, 1936, and Allen's reply thereto, heretofore set forth, constituted a written contract between the parties whereby defendant was to furnish plaintiff with hair for the second quarter of 1936. It will be noted that this contract was complete in itself as to quantity, quality, price and terms of shipment and that the language used in hilde's letter imports a contract of sale as of the date of this letter. There is no reference in either of the letters as to an oral agreement covering the year 1936.

It will also be noted that in Allen's letter to Wilde of July 2, 1936, he stated that "we are very much interested in knowing what your intentions are in regard to the hair situation for the third quarter. We are desirous of getting settled on this item at your earliest convenience." There is nothing in this letter to indicate that there was an oral agreement for the year 1936, which would, of course, include the third quarter thereof. Nothing was said in this letter as to price. If defendant was already obligated to furnish the Allen Company with hair for the third quarter on the cost-plus basis as plaintiff now claims, why the anxiety to get the hair situation "settled" for that quarter?

wilde and Allen, as already shown, did enter into a written contract by their respective letters of July 22, 1936, and July 23, 1936, under the terms of which defendant agreed to furnish plaintiff with hair during the third quarter of the year. This contract was also complete as to quantity, quality, price and terms of shipment. It is significant that no reference was made in the correspondence constituting this contract to an oral agreement between the parties for a year's supply of hair. Wilde's letter to Allen stating the terms of this contract does refer however to "contract made with you as per our letter of April 28, 1936," in connection with uncompleted deliveries of hair due in the previous quarter.

One of the essential elements of any enforceable contract of sale is that of price. It will be recalled that plaintiff's present theory as set forth in the amendment filed to its complaint at the

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One of the essential elements of any enforceable contract of sale is that is price. It is no that the incomplaint at the theory as set forth in the amendment filed to its complaint at the

close of all the evidence is that the price stipulated in the oral agreement alleged to have been entered into between the parties at the Philadelphia meeting in Movember, 1935, was one cent a pound over the average price paid by the defendant to tanners for hair ascribable to the last three quarters of the year 1936. Allen's testimony was in conformity to this theory. In this connection it is pertinent to examine prior pleadings filed by plaintiff in this cause. In its original complaint it alleged that a price of 6-1/2 cents a pound was agreed to for the hair ascribable to the first quarter and that "the price of the hair to be delivered the succeeding quarters of the year 1936 should be such sum as was thereafter agreed to between the plaintiff and the said defendant;" and that "on august 20, 1936, plaintiff and defendant agreed that the price of the hair ascribable to the third and fourth quarters of the year 1936 should be 7-1/2 cents per pound." These allegations as to the manner in which the price was to be determined and as to the agreement of August 26, 1936, fixing the price at 7-1/2 cents for the third and fourth quarters were realleged in plaintiff's verified answer filed herein to defendant's counterclaim. The same allegations were also made in a sworn answer filed by plaintiff in a suit brought against it by defendant in Delaware to recover on the same claim asserted in the counterclaim.

In the face of the written agreement of the parties of July 22, 1936, covering the third quarter, plaintiff was, of course, forced to abandon the position taken in its original complaint that a price of 7-1/2 cents a pound for the third and fourth quarters was agreed to on August 26, 1936. Notwithstanding plaintiff's cost-plus theory as to price set forth in the amendment to its complaint and the statement in its brief that it is on that theory it relies, strange to say, said amendment also contains the allegation that "on August 26, 1936, defendant stated to plaintiff that the price of the hair ascribable to the fourth quarter of the year 1936 would be 7-1/2 cents per pound."

It will be noted that in this allegation the alleged agreement of August 26, 1936, purported to fix the price for the fourth quarter only

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In the face of the written agreement of the parties of July 22, 1936, covering the third quarter, plaintiff was, of course, forced to abandon the position taken in its original complaint that a price of 7-1/2 cents a pound for the third and fourth quarters was agreed to on august 26, 1936. Notwithstanding plaintiff's cost-plus theory as to price set forth in the amendment to its complaint and the statement in its brief that it is on that theory it relies, strange to say, said amendment also contains the allegation that "on august 26, 1936, amendment stated to plaintiff that the price of the hair ascribable to defendent stated to plaintiff that the price of the hair ascribable to it will be noted that in this allegation the alleged agreement of agust 26, 1936, purported to fix the price for the fourth quarter only

and not for the third and fourth quarters as alleged in the original complaint. It should also be remembered that allen in his letter to Wilde of November 25, 1936, stated that silde had agreed on the occasion of the meeting on August 26, 1936, to furnish plaintiff with hair for the fourth quarter at 7-1/2 cents a pound. Plaintiff urges that the several theories as to price advanced by it in its various pleadings are reconcilable in that on the occasions when the price was fixed it was determined on the basis of the price paid by defendant to the tanners. This argument is refuted by the documentary evidence in the record, as well as by the admission contained in the allegation in plaintiff's earlier pleadings that the price of the hair for the last three quarters should be such sum as the parties agreed upon. Flaintiff's original price theory made absolutely no reference to tannery prices or average tannery prices paid by defendant.

While the price theory advanced by plaintiff in its earlier pleadings did not conclude it from thereafter advancing another and entirely different theory as to this essential element of the alleged oral agreement, the allegations heretofore pointed out in such prior pleadings may be considered as admissions affecting the credibility of allen, who was the only representative of plaintiff who was familiar with the facts and who it must be presumed related the facts to the attorneys who prepared said pleadings, as well as the answer filed in the Delaware case. Such sworn admissions alone are sufficient to cast suspicion on the merits of plaintiff's claim. In Joyce v. Humbird, 78 Fed. (ad) 356 (C.C.A. 7th), in passing upon admissions against interest made in a sworn answer, the court said at p. 389:

"*** appellants' sworn answer contained the following allegation:

"'Said Humbird represented to defendant that Clearwater Timber Company owned in excess of four billion feet of timber, more than 50% of which was white pine of good quality.'

[&]quot;It is quite inconceivable that appellants, when seeking to avoid the possibility of a large money judgment by charging fraud as a defense, should assert in their pleadings that the false representation was that 'more than 50% of the timber was white pine' when in fact said representation was that 60% to 75% of the timber was white pine.

and not for the third and fourth quarters as alleged in the original complaint. It should also be remembered that Allen in his latter to wilde of November 25, 1936, stated that with hed agreed on the occasion of the meeting on August 26, 1936, to furnish plaintiff with hair for the fourth quarter at 7-1/2 cents a pound. Plaintiff urges that the several theories as to price advanced by it in its various pleadings are reconcilable in that on the occasions when the price was fixed it was determined on the basis of the price paid by defendent to the tanners. This argument is refuted by the documentary evidence in plaintiff's earlier pleadings that the price of the hair for the last three quarters should be such sum as the parties agreed upon. Taintiff's original price theory made absolutely no reference to tannery prices or average tannery prices paid by defendant.

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"It is possible but most unlikely that counsel, in ascertaining the fraudulent representations made by unbird upon which he was to base the fraud charge, misunderstood Joyce and the misrepresentation was 60% to 70% of white pine instead of 50% as stated in the answer. It is also possible, but we think quite unlikely, that such pleading when sworn to by Joyce was by him not understood. On the other hand, the court might well assume that counsel who drew appellants' pleadings obtained his facts from his clients; that the clients, when they signed their answers and counterclaims and under oath asserted the truth of the statements therein appearing, were in fact speaking the truth, and that the testimony subsequently given by said clients was at variance with the facts."

We are impelled to hold that the trial court properly found the issues in favor of defendant and that no adequate reason has been shown why the judgment should be disturbed.

We also think that the alleged oral agreement, upon which plaintiff relies, could not have been completely performed, according to its terms, within one year from the making thereof and that it is therefore void under the Statute of Frauds of Michigan, the state wherein it was to be performed.

In the view we take of this case we deem it unnecessary to discuss the other points urged.

For the reasons stated herein the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

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HENNING E. JOHNSON,
Appellee,

CHICAGO CITY BANK & TRUST COMPA a corporation, as trustee under Trust No. 2524, JOSEPH N. OPTMER ROYAL INDUSTRITY COMPANY, a OFFO

Defendants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

ON APPEAL OF CHICAGO CITY BANK & TRUST COMPANY, a corporation, as trustee under Trust No. 2524, appellant.

305 I.A. 621

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COUNT.

Plaintiff, Menning I. Johnson, filed his complaint against the Chicago City Bank & Frust Company, as trustee, and others, as defendants, for the foreclosure of a receiver's certificate, which had been issued to him in a prior proceeding for the partial foreclosure of a trust deed prosecuted for the benefit of the holder of subordinated bonds and interest coupons. The trial in the instant case resulted in a decree of foreclosure in favor of plaintiff, from which the Chicago City Bank & Trust Company has perfected this appeal. No point has been raised on the pleadings which consist of the complaint of Henning E. Johnson and the answer of the Chicago City Bank & Trust Company, as trustee.

On June 15, 1928, Wollenberger & Co., a corporation, made a loan of \$200,000 to one Henry and Elizabeth Lutz, evidenced by a bend issue of 460 bonds of various denominations, maturing consecutively over a period of ten years. The bonds, which were sold to the public, bore interest at the rate of 6% per annum, payable semi-annually, and were secured by a trust deed conveying to John J. Rahlf. an officer of Wollenberger & Co., as trustee, the property involved in this proceeding, which consists of two lots located at the southeast corner of South Chicago and Stony Island avenues and

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APPEAL PROM CIRCUIT COURS, COOK COUNTY,

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On June 15, 1923, Wollenberger & Co., a corporation, made a loan of \$200,000 to one Henry and Elizabeth Inta, evidenced by a bond issue of 460 bonds of various denominations, maturing comsecutively over a period of ten years. The bonds, which were sold to the public, bore interest at the rate of 6% per annua, payable semi-ammually, and were secured by a trust deed conveying to John J. Rahlf, an officer of Wollenberger & Co., as trustee, the property involved in this proceeding, which consists of two lots located at the southeast corner of South Chicago and Stony Island avenues and

79th street, Chicago. The premises are improved with two buildings, one a two-story brick and concrete restaurant building containing three public dining rooms and three private dining rooms and the other a one-story brick and terra cotta gasoline and automobile service station.

On July 1, 1929, the mortgagors defaulted in the payment of a balance of \$1,000 due on interest coupons series 2, and on January 1, 1930, defaulted in the payment of the entire amount due on interest coupons Series 3, aggregating \$6,000.

on May 17, 1930, Wollenberger & Co., which had acquired the unpaid interest coupons of Series 2 and 3 aggregating \$7,000, filed its bill of complaint in the Superior court of Cook county, as case No. 518012, for the express purpose of foreclosing the lien of the trust deed for the balance due on interest coupons Series 2 and 3, subject to the continuing lien of the same trust deed as security for the payment of the remaining unmatured indebtedness evidenced by the principal bonds and by interest coupons series 4 to 10, both inclusive. This bill of complaint was joined in by Rahlf, the trustee, as a cocomplainant, for the sole and exclusive benefit of Wollenberger & Co. as the owner of the defaulted interest coupons.

On May 20, 1930, an order was entered in that proceeding upon the application of Wollenberger & Co. and Rahlf, as trustee, appointing a receiver to collect the rents, issues and profits from the premises for the benefit of Wollenberger & Co.

Subsequent to the institution of that subordinate foreclosure proceeding, Wollenberger & Co. acquired interest coupons Series Mos. 4 and 5, which had respectively matured on July 1, 1930, and on January 1, 1931, and acquired principal bonds Nos. 1 to 10, both inclusive, aggregating \$10,000, which matured on July 1, 1930, and subordinated these interest coupons and principal bonds to the continuing lien of the trust deed as security for the payment of the remaining unmatured indebtedness of \$190,000 evidenced by principal bonds Nos. 11 to 460, both inclusive, and interest coupons Series 6 to 10, both inclusive.

On August 26, 1930, Rahlf wrote a letter to Optner, the receiver

79th street, Chicago. The premises are improved with two buildings, one a two-story brick and concrete restaurant building containing three public dining rooms and three private dining rooms and the other a onestory brick and terra cotta gasoline and automobile service station.

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On August 26, 1930, Rahlf wrote a letter to Optner, the receiver

who had been appointed in the partial foreclosure proceeding, directing him to enter into a contract with the plaintiff herein for remodeling of the main building on the property in question. Rahlf agreed in
his letter to purchase the receiver's certificates issued in payment
of the work and further agreed that if such certificates were not
issued, he would pay for the work mimself and would indemnify the
receiver against any liability.

On October 7, 1930, an order was entered in that case on the petition of Optner, as receiver, authorizing him to expend \$3,300 as the cost of the proposed alterations and remodeling which included the installation of a dance floor and a new orchestra pit. This order also authorized Optner to issue receiver's certificates not to exceed the sum of \$3,300 in payment of the work and provided that the certificates were to be a first and prior lien upon the rents and income to be received by him as receiver from the property in question and were to be paid out of the rents and income when the same should be received by him as receiver for and during a period of two years from the date of the order.

On October 29, 1930, Optner issued to Johnson, the plaintiff herein, a receiver's certificate in the sum of \$1,300 in the form designated in a subsequent order entered on the same day. The certificate provided, inter alia, that it was issued in accordance with the order of October 7th and that it was a first and prior lien on the rents and income received by the receiver, superior to the rights of all parties in the junior proceeding identified as case No. 518012 and also to the rights of all parties in case No. 518341. Case No. 518341, which is not involved in any way in this appeal, was a chancery proceeding for the foreclosure of a chattel mortgage on certain personal property located on the premises.

On July 7, 1931, a decree was entered in that proceeding (case No. 518012) providing for the partial foreclosure of the trust deed as security for the subordinated principal bonds and interest coupons which had been acquired by collemberger & Co., and for the costs of the proceeding, and directed a sale of the premises for the benefit

who had been appointed in the partial foreclosure proceeding, directing him to enter into a centract with the plaintiff herein for remodeling of the main building on the property in question. Habif agreed in
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On October 29, 1930, Optner issued to Joimson, the plaintiff herein, a receiver's certificate in the sum of \$3,300 in the form designated in a subsequent order entered on the same day. The certificate intered; intered; that it was issued in accordance with the order of October 7th and that it was a first and prior lien on the rents and income received by the receiver, superior to the rights of all parties in the junior proceeding identified as case No. 518012 and also to the rights of all parties in case No. 518341. Case No. 518341, which is not involved in any way in this appeal, was a chancery proceeding for the foreclosure of a chattel morigage on certain persons proceeding for the foreclosure of a chattel morigage on certain persons

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of Wollenberger & Co.

On August 5, 1931, the premises were sold for \$20,000 at a master's sale held pursuant to the decree, leaving a deficiency due Wollenberger & Co. of \$16,591.26. The master's sale was approved on August 25, 1931.

During the pendency of this partial foreclosure proceeding principal bonds Mos. 11 to 20, both inclusive, and interest coupons Series 6, which matured on July 1, 1931, went into default. Robert H. Mollenberger, as successor trustee (Mahlf maving resigned), thereupon elected to declare the balance of the principal indebtedness of \$190,000 secured by the trust deed due and mayable and on October 22, and 1931, filed his bill of complaint in the Superior court of Cook county as case No. 545437 for the complete foreclosure of the lien of the trust deed for the benefit of the holders of principal bonds Nos. 11 to 460, both inclusive, and interest coupons weries 0, together with accrued interest.

On Acvember 27, 1931, the successor trustee, as the representative of the holders of the unsubordinated bonds and interest coupons, in order to preserve the income from the property for their benefit, procured the entry of an order in the junior proceeding (case No. 518012) extending the receivership to the complete senior foreclosure proceeding.

On May 13, 1936, a decree of foreclosure was entered in the latter proceeding (case No. 545437), pursuant to which a master's sale was held on June 30, 1937. The sale was subsequently confirmed and a master's certificate of sale was issued to one Harold C. Bull.

On October 1, 1938, after the expiration of the statutory period of redemption from the master's sale in Superior court case No. 545437, a master's deed was issued to one William E. Fisher as assignee of Harold C. Bull, and thereafter a deed in trust was executed by William E. Fisher conveying title to the property in question to the present owner, the defendant, Chicago City Bank & Trust Company as trustee under its Trust No. 2524.

On March 24, 1939, plaintiff filed his complaint in this

of Wellenberger & Co.

On suguet 5, 1931, the presises were sold for \$20,000 at a master's sale held pursuant to the decree, leaving a deficiency due wellemberger & Co. of \$16,591.26. The master's sale was approved on August 25, 1931.

During the pendency of this partial foraclosure proceeding principal bonds Nos. 11 to 20, both inclusive, and interest coupons Series 6, which matured on July 1, 1931, went into default. Robert 1. 1911-1911.

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On Tarch 24, 10:0 plaintiff filed his completer in this

case alleging that he is the owner of a receiver's certificate which had been issued to him in the junior foreclosure proceeding of the subordinated bonds; that the issuance of the certificate had been authorized by Rahlf, the first mortgage trustee, by the letter heretofore referred to from Rahlf to Optner, the receiver in said proceeding; that there is a balance of \$1,800 due him on said certificate, together with interest at 65 per amoun from October 29, 1930; that the title of the defendant, Chicago City Bank & Trust Company, which was derived through the foreclosure sale held pursuant to the decree entered in the subsequent complete foreclosure of the unsubordinated bonds, is subject to the lien of the receiver's certificate; and that plaintiff is entitled to a reasonable allowance for his attorneys' fees. The complaint concluded with a prayer for an accounting, the appointment of a receiver, a sale of the property in question in satisfaction of the amount found to be due plaintiff and a deficiency judgment.

The defendant, Chicago City Bank & Trust Company, as trustee, filed an answer denying that the receiver's certificate was a lien on either the rents accruing from or on the fee title to the property involved, and alleged in detail the facts hereinbefore set forth concerning the subsequent complete foreclosure of the unsubordinated bonds after the receiver's certificate had been issued in the partial foreclosure proceeding, the entry of the decree in the complete foreclosure proceeding, the sale held pursuant thereto and the issuance of the master's deed upon the expiration of the period of redemption. The answer also denied that mahlf as trustee had authority in the junior foreclosure proceeding to bind the holders of the unsubordinated and unmatured bonds and prayed for the entry of a decree dismissing plaintiff's complaint for want of equity.

Since substantially all the material facts alleged in the complaint, except the authority of Rahlf as trustee to bind the holders of the unsubordinated bonds in the junior foreclosure proceeding, were admitted to be true, and since for the purpose of the trial all the material facts alleged in the answer were also admitted to be true by reason of plaintiff's failure to reply to same, the contro-

case alleging that he is the owner of a receiver's certificate which had been issued to him in the junder for cleave proceeding of the subordinated bonds; that the issuence of the certificate had been authorized by Rahlf, the first mertgage crustee, by the ister hereto-authorized by Rahlf, the first mertgage crustee, by the ister hereto-tore referred to from Rahlf to Opther, the receiver in said proceeding; that there is a balance of \$1,800 due him on said certificate, together with interest at 6% per names from October 29, 1930; that the setter with interest at 6% per names from October 29, 1930; that the fitte of the defendent, Ohioseo Sity Bunk & Brust Compeny, which was derived through the foreclosure saie held juranent to the decree entered in the subsequent conclete foreclosure of the unsubordinated boats, is subject to the lies of the receiver's certificate; and that plaintiff is entitled to a reasonable allowance for his attorneys' fees, the complaint concluded with a preyer for an accounting, the appointment of a receiver, a sais of the property in question in as tisfaction continued to be due plaintiff and a deficiency judgment.

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Since substantially all the material facts alleged in the mold ram, enoperation of the control of the control of the trial all risk facts alleged in the answer were also admitted to be control eason of plaintiff's failure to reply to same, the control

versy resolved itself purely into a question of law.

No evidence was offered by plaintiff other than his introduction of documentary evidence, which consisted of the letter of
Rahlf to Optner, the remodelling contract, a certificate copy of the
order directing the issuance of the receiver's certificate, a certified copy of the order approving the form of the receiver's certificate, a certified copy of the order extending the receivership from
the partial foreclosure proceeding to the complete foreclosure proceeding, the receiver's certificate itself, showing an unpaid balance
of principal due thereon of \$1,800, and a certified copy of a plan
of reorganization. The letter of Rahlf to Optner was received in
evidence over the specific objection of defendant that plaintiff
had not attempted to prove ahlf's authority in the junior foreclosure
proceeding to bind the holders of the unsubordisted and unmatured bonds.
No evidence was offered by the defendant.

a first and prior lien upon the title and upon the rents and income to be derived from the real estate described in said certificate paramount to the rights of all parties to this cause and further found that the title of the defendant, Chicago City Bank & Trust Company, as trustee, to the property in question and its right to rents and income from same is subject and subordinate to the lien of the plaintiff as the holder of the receiver's certificate and directed that unless the sum of \$2,935 with interest thereon was paid to plaintiff by defendant within thirty days, plaintiff's lien should be enforced, either by the appointment of a receiver to collect the rents and income until a sufficient amount was realized to pay the amount found to be due plaintiff, or by the sale of the real estate in satisfaction thereof or by both the appointment of a receiver and a sale of the property.

Defendant's first contention is that a court of chancery has no authority to direct the sale of real estate, the title to which has been acquired from the grantee of a master's deed issued in a proceeding for the complete foreclosure of a first mortgage, to satisfy a

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for the complete foreclosure of a first mortgage, to satisfy a

balance due the holder of a remeiver's certificate issued in a prior proceeding to foreclose a junior incumbrance.

As a general rule the rights of holders of vested superior liens cannot be subordinated without the consent of the holders of such liens for the surpose of enabling a receiver to acquire funds with which to manage and operate private property for the benefit of junior interests. In the recent case of Cody Trust Company v. Motel Clayton Company, 293 Ill. App. 1, a receiver had been appointed in a partial foreclosure proceeding brought by the Cody Trust Company, individually and as trustee, for its enclusive benefit as the holder of certain subordinated interest coupons secured by a trust deed on real estate improved with a notel. Subsequently the Chicago fitle & frust Company, as successor trustee to the Cody rust Company, filed its complaint on behalf of the holders of all unsubordinated bonds and interest coupons for the complete foreclosure of the same trust deed and procured the entry of an order extending the receivership to the latter case. Prior to the extension of the receivership the receiver had incurred obligations in his management of the hotel for The creditors filed petitions in supplies, wages and merchandise. both proceedings, praying for the issuance of receiver certificates. which would constitute superior liens on the real estate prior to that of all other persons, including the lien of all of the first mortgage bondholders. Upon the application of the creditors and over the objection of the successor trustee, the court entered an order in both cases directing the issuance of certificates to the creditors payable six months after date and further directing "that the certificates should constitute a lien on the premises and the rents thereof and any funds realized from the sale thereof prior to the lien of all persons claiming any lien on the premises." In that case the court said at pp. 15, 16, 17 and 18:

"It is proposed by the petitioners that by the process of collecting the income, rents and profits of the premises by the receiver to pay the subordinated demands of the Cody Trust Company,

belance due the holder of a receiver's certificate is used in a prior proceeding to foreclose a junior incumbrance.

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the claims of the petitioners for services, material, and money furnished for the operation of the hotel, are superior to the original lien of the trust deed in favor of the bondholders and their claims should be made a lien on the premises, by means of receiver's certificates, paramount to the lien of the bondholders.

"As a general rule, the fixed legal right of a mortgagee cannot be impaired by any equities subsequently arising against the objection of the mortgagee. In the case of inseland v. American Loan a frust Co., 176 V. J. 89, 14 L. Ed. 79, it was said: 'It is the exception and not the rule, that such priority of liens can be displaced. 'e emphasize this fact of the sacredness of contract liens, for the reason that there seems to be a growing idea that the chancellor, in the exercise of also equitable powers, has unlimited discretion in this matter of the displacement of vested liens.' The general rule is not controlling in cases of railroad mortgages. A mortgagee of a railroad accepts the lien of his cortgage with the understanding and condition that the necessary expenses of the operation of the railroad by a receiver may by a court of equity, within prescribed limits, be given a preference as unsecurad claims over the lien of his mortgage. It has been stated that this is the most extreme exercise of power ever ventured upon by a court of equity. Migh on Receivers, 4th ed., sec. 398. ***

"In the case at bar, the effect and result of the orders making the receiver's certificates a first lien on the mortgaged premises is to compel the first lien holders to pay for the attempted collection or satisfaction of the subordinated or second lien of the Cody frust Company. In any case, assuming that it is a valid exercise of jurisdiction by a cour of equity, the question of making receiver's certificates a first lien superior to prior vested liens, is purely an equitable one, and to be determined upon just and equitable principles, as the circumstances of the case shall variant. As pointed out in the case of Flemins v. Anderson, supra [220 Ill. App. 570], it may be done in receiverships of industrial corporations when it is made very clear to the court that it is for the best interests of all parties that the power be exercised in order to preserve the corporate property or the franchise of the corporation. In the case of Makeel v. Hotchkiss, 190 Ill. 311, it is held that a receiver's expenses for running a hotel would not be made a paramount lien upon the mortgaged hotel, superior to the rights of the holder of a master's deed under a foreclosure sale, who was not a party to the receivership suit, which involved only the equity of redemption. (Thomsen v. Cullen, 196 vis. 581, 219 N. ... 439.) The bondholders were entitled to their day in court and to contest the validity of the order giving the receiver's certificates priority over the trust deed. (Mercantile Trust Co. v. Tennessee Cent. R. Co., 291 Fed. 462; Sibley County Bank of Henderson v. Crescent Milling Co., 161 Minn. 360, 201 N. W. 618.)"

The reluctance of courts to impair the security of vested liens is well illustrated in <u>Hooper v. Central Trust Co.</u>, 81 Md. 559, where the court said at pp. 591 and 593:

"When the property of private corporations or of individuals has been placed in the hands of a receiver, all expenses for safe keeping and preservation are properly payable out of the income, if there be any, or if there be none, then out of the proceeds of the corpus of the estate when sold. But this necessary power by no means includes authority in such instances to allow the creation of liens through the medium of receivers' certificates which will take priority over existing antecedent liens. 'Extensive as are the powers of Courts of Equity, they do not authorize a chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private

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corporations and natural persons, it is the duty of Courts to uphold and enforce them against all subsequent encumbrances.' Parmers' Loan and Trust Co. v. Grape Creek Coal Co., 50 Fed. Rep. 431; S. C. 16 L. R. A. 603. *** It would be exceedingly dangerous to concede to a Court of Equity the power to displace, in favor of receivers' certificates, subsisting liens on the property of private corporations, or of individuals. No mortgage lien would ever be secure if it were liable to be postponed to subsequent obligations created by a receiver."

In Hanna v. State Trust Co., 70 Ped. 2, the court in discussing this question said at pp. 5. 7 and 8:

"The precise question in this case is whether a court of chancery which has appointed a receiver for an insolvent private corporation in a foreclosure suit brought by a second mortgagee may, against the objection of the first mortgagee, authorize its receiver to issue receiver's certificates to raise money to carry on the business of the insolvent corporation and to improve its lands, and make such certificates a first and paramount lien upon the lands covered by the first mortgage. To far as we are advised, the power to do this has been denied in every case in which the question has arisen. ****

"In this case, the company being insolvent, and its property mortgaged for more than it was worth, there was no way of raising money to set the receiver up in business, except by the court giving its obligations, in the form of receiver's certificates, and making them a paramount liem on all the property of the corporation, by displacing the appellants' prior liens thereon. As commonly happens in cases of this character, the receiver, the insolvent corporation, and the junior mortgagee united in arging the court to arm its receiver with the desired powers. They ran no risk in so doing. The corporation was insolvent, and a foreclosure of the prior mortgage would leave the junior mortgagee without any security; so that it had nothing to lose, and everything to gair, in experiments to enhance the value of the mortgaged property, so long as the cost of those experiments are made a prior lien thereon. The effect of the proceeding was to burden the prior mortgagee with the whole cost of the expenditures and experiments made for the betterment of the property on the petition, and for the benefit of the insolvent corporation and the junior mortgagee. ***

"If junior lien craditors of an insolvent private corporation could do what has been attempted in this case, every private corporation operating a sawaill, gristmill, mine, factory, hotel, elevator, irrigating ditches, or carrying on any other business pursuit, would speedily seek the protection of a chancery court and those courts would soon be conducting the business of all the insolvent private corporations in the country. If it were once settled that a chancery court, through a receiver appointed on the petition of a junior mortgagee, could carry on the business of such insolvent corporation at the risk and expense of those holding the first or prior liens on the property of the corporation, such liens would have little or no value."

It will be recalled that Rahlf, the original trustee under the trust deed, who was one of the complainants in the suit for the partial foreclosure of the trust deed, authorized the issuance of plaintiff's certificate for the cost of the aforesaid remodeling during the prosecution of the junior subordinated proceeding. Inasmuch as Rahlf, the cocomplainant, with hellenberger & Company, of which he was an

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officer, was acting in that proceeding solely for the benefit of Wollenberger & Company as the holder of the subordinated bonds and interest coupons, he could not be held to have had authority therein to bind the holders of the unsubordinated bonds and interest coupons on the theory that they were quasi parties by representation. (Cody Trust Company v. Notel Clayton Company, supra; Belknap Savings Bank v. Lamar Land & Canal Co. et al., 40 Ore. 523, 64 Pac. 212; Raht, Executor et al. v. Attrill et al., 106 N. Y. 423, 13 N. E. 282.)

The trial court in the instant case not only disregarded the limitation of the order entered in the partial foreclosure proceeding authorizing the issuance of the receiver's certificate, but ix also disregarded the provisions of the certificate itself when it decreed the certificate to be a first lien on the property in question. The order entered on October 7, 1930, in the junior proceeding, directing receiver's the issuance of/ that certificates, provided that the proposed certificates "shall and are hereby made a first and prior lien upon the rents, issues, income and profits hereafter received by the receiver from the premises and chattels described in the complainant's bill of complaint filed in the above entitled cause." That order also provided "that the said Receiver pay the Certificates of Evidence of Indebtedness issued pursuant hereto from and out of the rents, issues, income and profits to be derived from the aforesaid promises and chattels when the same shall be and may be received by said receiver for and during a period of two years from the date hereof." The language of the order, being clear, plain and understandable, was not open to construction. The order definitely determined that the certificate should be a lien on the rents only and that it was payable by the receiver from rents received by him during a period of two years commencing with the date of the entry of said order.

In view of the fact that the certificate itself recites that it was issued under and by virtue of the authority granted to the receiver by the order of October 7, 1930, and states that it "is by virtue of the terms of said order a first and prior lien upon the

officer, was acting in that proceeding solely for the benefit of wollenberger & Company as the holder of the subcrainsted bonds and interest coupons, he could not be held to have had authority therein to bind the holders of the unsubordinated houds and interest coupons on the theory that they were <u>dunsited</u> parties by representation. (<u>Gody v. Lamor Lend & Ganal Co. et al.</u>, 40 Ore. 523, 64 Pac. 212; Rebt.

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rents, issues, income and profits received by the receiver from the premises and chattels on the above described premises," it is difficult to understand the theory upon which the trial court in its decree not only revived the expired lien of plaintiff's certificate upon the rents accruing from the property, but enlarged its scope by declaring said certificate to be a paramount lien upon the property itself to the detriment and displacement of defendant's interest as the holder of the fee title acquired through the subsequent complete foreclosure, which had been prosecuted for the sole benefit of the prior vested lienholders. As already shown plaintiff's certificate was not nor did it purport to be a lien on the title to the property in question but was only a lien on the rents to be collected during the receivership in the junior foreclosure proceeding.

If plaintiff's certificate possesses the superior qualities which it is now claimed to have, he should have asserted his right to participate in the proceeds of the sale, amounting to \$20,000, under the subordinate foreclosure decree. This sale was had in August, 1931. Since the order under which the certificate was issued explicitly made it a lien only upon the rents and provided for its payment by the receiver out of rents collected by him during the period of two years, it seems strange that, after the extension of the receivership, plaintiff utterly disregarded the receivership proceeding out of which he might have expected to be paid. The receivership was never insolvent, yet plaintiff did not see fit to assert his claim for the balance due on his certificate against the receiver at any time.

Plaintiff received payments on his certificate until the order extending the receivership was entered November 27, 1931, but he did nothing thereafter to enforce the lien of said certificate or to collect the balance now claimed to be due thereon until he instituted this proceeding on March 24, 1939. We are also at a loss to understand why plaintiff did not attempt to participate in the proceeds of the sale held in the complete foreclosure proceeding if his certificate had the enduring priority now claimed for it instead of now attempting

rents, issues, income and profits received by the receiver from the premises and chattels on the above described premises, " it is difficult to understand the theory upon which the trial court in its decree not only revived the expired lien of plaintiff's certificate upon the rents accruing from the property, but enlarged its scope by declaring said sertificate to be a peramount lien upon the property itself to the detriment and displacement of defendant's interest as the holder of thich had been prosecuted for the sole benefit of the prior vested which had been prosecuted for the sole benefit of the prior vested lienholders. As already shown plaintiff's certificate was not nor did it purport to be a lien on the title to the property in question but it purport to be a lien on the rents to be collected during the receivership was only a lien on the rents to be collected during the receivership

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Plaintiff received payments on his certificate until the order ing the receivership was entered November 27, 1931, but he did nothing thereafter to enforce the lien of said certificate or to this proceeding on March 24, 1939. We are also at a loss to understand this proceeding on march 24, 1939. We are also at a loss to understand sale held in the complete forcelosure proceeding if his certificate sale held in the complete forcelosure proceeding if his certificate

to attack the title received by the defendant, Chicago City Bank & Trust Company, from the grantee in the master's deed issued as a result of the sale held in the complete senior foreclosure proceeding. In our opinion plaintiff's claim is entirely lacking in merit.

Other points urged have been considered but in the view we take of this case we deem it unnecessary to discuss them.

For the reasons stated herein the decree of the Circuit court is reversed and the cause is remanded with directions to dismiss plaintiff's complaint for want of equity.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

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40712

ARLOUINE PRICE, Appellee,

V.

YELLOW CAB COMPANY, a corporation, Appellant. APPEAL FROM CERCUIT COURT,

305 I.A. 622

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Arlouine Price, plaintiff, while riding as a passenger for hire in one of defendant's taxicabs with two other women, was injured when the cab ran into the concrete foundation of an electric light post at the entrance to St. Luke's Hospital, in Chicago. She brought suit of trespass on the case. Trial by jury resulted in a verdict of \$40,000 in her favor, of which \$10,000 was remitted and judgment was entered for \$30,000. Defendant appealed.

Miss Price was a trained nurse, who had at various times served at St. Luke's Mospital. At the time of the accident, which occurred August 27, 1936, she was 36 years of age. Plaintiff with two other women entered the taxicab at the entrance of St. Luke's Mospital on Michigan avenue. The cab proceeded westward through the gates of the hospital, and when it reached within ten feet of the concrete post in the center of Michigan boulevard, a little to the south of the hospital entrance, it either stopped or slowed down. The driver was apparently locking north watching southbound traffic, and as he turned south the cab collided with the concrete post in the center of the boulevard. The three passengers were thrown from their seats. Two of them sustained only minor bruises, but plaintiff claims to have been thrown in such a manner that when the cab stopped she was found seated on the floor with her knees pressed against her chest. Apparently there was no damage to the cab,

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which backed up immediately into the driveway of the hospital.

Plaintiff was taken into the examining room in a wheel chair, and after an examination was put to bed. The examination on admission shows contusions and abrasions to both knees, possible fracture of left patella, a bruise on the left forehead, a cut on the right upper lip, bruises on both elbows, the left knee and the left hip. She was placed in charge of Dr. Hansen, a member of the staff, who looked after patients of the Yellow Cab Co. at the hospital.

Plaintiff complained of many pains and aches and specialists on the staff were called in for examinations in an effort to diagnose and determine the extent of her injuries. Among these specialists were Dr. Edwin W. Ryerson, an orthopedic physician, Dr. Frank Brawley, a specialist on the eye, Dr. George W. Hall, a neurologist, and others. Numerous K-ray pictures were taken by Dr. E. L. Jenkinson, the roentgenologist of St. Luke's Hospital, and remedial measures were adopted to take care of the superficial bruises. Among plaintiff's early complaints was an injury to her neck. X-ray pictures were taken and she was treated for this injury. After some five or six weeks she left the hospital on October 8, 1936, and numerous witnesses testified that she walked out at the end of her treatment without any indication of a limp. It was conceded on oral argument that her minor injuries, cuts and bruises, had disappeared at the time she left the hospital in October, 1936. It subsequently developed, however, that an injury to the left sacroiliac joint was the one upon which greatest emphasis was laid upon the trial, and voluminous testimony was received with reference to the nature and extent thereof.

After plaintiff left the hospital the first time she returned to the place where she resided in Chicago, and while there applied home remedies, such as a heating pad on her head and neck, hot showers, and sodium for an upset stomach. After she had been home for about two weeks she called Dr. W. J. Jeffries, who had never treated her

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before. She went out for meals, and testified that she sufffered from dizziness and pain and had some difficulty in controlling her legs, which "kept jerking". On one of Dr. Jeffries' visits, Dr. Hansen also happened to call on her. He had no knowledge that Dr. Jeffries had been consulted. The two physicians suggested that she return to the hospital. The clinical history of the hospital, prepared by an interne, indicates that the patient returned with the same complaints she had on her previous visit, namely, nausea, occasional vomiting, headache, dizzy spells and diarrhea. On the second visit she also complained of pain in the back and severe itching in her left foot and leg. Various types of treatment were applied, including ice bag, infra-red lamp, alcohol rubs, and medicine for extreme restlessness. She left the hospital on December 22, fairly comfortable and considerably improved.

Plaintiff entered the hospital for the third time in May, 1937, and remained some three or four weeks. She entered the hospital with a limp on her left side, and complained of pains in her back. Laboratory tests were made and traction was applied on her hip. The hospital records indicate that although she was quite uncomfortable because of the traction weights, she rested more easily as time elapsed, slept better, but still complained of pain in her back.

Because of some thickening in the sacroiliac joint, as shown by X-rays, it was important to ascertain whether or not plaintiff had ever had any infective diseases which might produce a thickening of the joint. By agreement of counsel the records of another stay in St. Luke's Hospital, in Pebruary, 1931, were introduced in evidence. They show that she then suffered from incipient pulmonary tuberculosis and hypothyroidism. The records further show that she had a fever for two years, running to approximately 100° every afternoon, a white blood count of 15,000 for a year, as against a normal of 9,000, that she had had blood and gray matter in the sputum, repeated attacks of "flu", complicated with pleurisy, diarrhea from four to five years, night sweats for a period of six months, repeated nasal hemorrhage,

before, She went out for meals, and testified that shesufffered from dizziness and pain and had some difficulty in controlling her legs, which "tept jerking", On one of Dr. Jeffries' visits, Dr. Mansen also happened to call on her. We had no knowledge that Dr. Jeffries had been consulted. The two physicians suggested that she return to the hospital. The clinical history of the hospital, prepared by an interne, indicates that the patient returned with the same complaints she had on her previous visit, namely, nauses, occasional vemiting, headache, diszy spells and diarrhea. On the second visit she also complained of pain in the back and severe itching in her left foot and leg. Various types of treatment were confortable and considerably introved.

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cough, general body aches, gastro-intestinal upsets, soreness across the chest, and shortness of breath. Examination of her stool showed some streptococcus, and a basal metabolism examination at that time showed hypothyroidism to an alarming extent. Defendant argues that these multiple ailments in 1931 indicate infection which might have accounted for the thickening in the sacroiliac joints. Plaintiff, on the other hand, insists that she had recovered from these ailments, and during the years in ediately preceding the injury was completely recovered so that she was able to play tennis, ride horseback and indulge in other forms of exercise.

bome of the specialists who were called in to attend plaintiff to administer to her complaints were unable to diagnose them as egrious ailments. She complained of double vision, but Dr. Brawley, an eye specialist, who was senior attending eye surgeon at St. Luke's Hospital. found no injury to the eye, no double vision and nothing except ordinary refractive errors which age brings on and glasses correct. Dr. George W. Hall, senior neurologist and physchiatrist at St. Luke's Hospital, made an examination, but kept no notes and had no recollection of his attendance on plaintiff. Dr. Edwin W. Ryerson had her in his care in October, 1936, and examined her carefully. She made complaints of her abdomen, but he could find no basis therefor. He did find that there was no rigidity of the muscles of the spine, as commonly found after injury or disease in the spinal column. Her knee and hip joints were free and movable, and he concluded that there was no definite injury to either the knee or the hip. Upon his examination of the X-rays he was unable to find any signs of injury to the sacroiliac joint. There was no muscle spasticity in the back. She returned to him for examination the following year, and his conclusions were the same.

In December, 1937, plaintiff saw Dr. Chaloupka, who referred her to Dr. Daniel H. Leventhal. Dr. Chaloupka was not called as a witness, but Dr. Leventhal, who examined her thoroughly, testified upon the hearing. Dr. Leventhal is an orthopedic surgeon and assistant professor in that branch of medicine at the University of Illinois

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and attending orthopedic surgeon at Michael Reese and Cook county hospitals. His examination was thorough and was reduced to writing. The conclusion reached by him was that plaintiff was suffering from hysteria or was malingering. A subsequent examination of plaintiff was made by Dr. Paul B. Magnuson, a specialist in bone surgery, who was on the faculty of Northwestern University and attending surgeon at Passavant Hospital. He was called as a witness on behalf of plaintiff and was the only one of the several specialists who found an injury to the sacroiliac joint and attributed the arthritis of which plaintiff complained to the injury. Dr. Hagnuson said that where infectious disease caused joint inflammation, that usually is general in character, and not localized, and that, "if she had any infection in her system back in 1931, that was going to affect her joints, it would have affected them before 1936." He also said that the condition could be cured by a fusion or bone-welding operation, which, if successful, would free the plaintiff from pain and eliminate the limp which she acquired in walking. At the conclusion of his testimony, the court requested the jury to withdraw from the court room, and out of its presence made the following statement: "The Court: The jury being out. do either of you want this woman to walk across the room?" Defendant's counsel replied that he would like to have Dr. Magnuson see her walk, and she accordingly walked up and down in the court room. The jury was then recalled, and Mr. Ryan, counsel for plaintiff, then said: "I would like to ask the doctor a question. In the light of what has occurred." Dr. Magnuson resumed the stand in the presence of the jury and plaintiff's counsel continued: "Dr. Magnuson, at the request of court or counsel, the plaintiff walked from where she is sitting over to the bench and back twice, in your presence and under your observation. Is that correct? A. That is right. Q. Have you any comments to make on it, Doctor, that would enlighten the jury, as to whether that walk is assumed or not, or natural under the circumstances? A. It looks to me, Mr. Ryan, in this form, as though it was exaggerated and assumed."

and attending orthopedic surgeon at Michael Reese and Cook county hospitals. His examination was thorough and was reduced to writing, The conclusion reached by his was that plaintiff was suffering from hysteria or was malingering. A subsequent examination of plaintiff was made by Mr. Faul B. Hagmuson, a specialist in bone surgery, who was on the faculty of Morthwestern University and attending surgeon at Passavant Mospital. He was called as a witness on behalf of plainms bound only statistings fareves only lo one ying only asw bons little inputy to the marrillas foint and a turbuted the arthritis of winds plaintiff complained to the injury. Dr. Magnuson said that where infrations discous course joint inflammation, that the course of in conrector, and not localized, and that, "if she and any intection in mer ayatem beek in 1931, tast was coing to affect uer joints, if mould have arrest a line before 1936." He also said that the wouldtion could be out a by a runted or bone - claim open tion, salein if successrul, would from the pidderiff from poin and eliminate the ling which ine southed in white, At the encludes of his tentions, he courte requested the jury to withdraw from the court room, and out of its presence made the following statements wine dours, the jury being "Ywoor sit across alsw ot meman this wow no redistribe roomy" Defendant's counsel regilled that he would like to may be beginning see her well, and she consideraly walled up and down in the court room, in jury wer town received, and wr. ayen, counsel for plaintiff, duen to the il would like to sek the doctor a question. In the light of what has cocurred." In . same on resumed the stand in the presence of the jury and plaintiff's counsel continued: "Dr. Magnuson, at was element and a coline This colin and also no truck to Jesuper and is sitting over to the bench and back twice, in your presence and under your observation. Is that correct? A. That is right. may you may comments to take on it, lector, that would enlighten the jury, as a mether that all is some a or ...t. or natural ander the circus concess A. It looks to me, ir. Ayang in this form, as though to be undergood one believed and outdood of

occupies some 1,200 pages of the record, and summittee to the jury. It passed these the constitutions of the Leventhal sith reference to hypteria or malingering, upon the testimony of the tracing, fire Ryerson, Dr. Hanson and others.

The sole paints presented as grown for revers 1 are that the andfort wight of the evidence is against danger in the anount of 1]0,000, that the verdict is essentive, that it was preduced by passion and projudice, countd by demonstrations of souling and bysteric made before the jurges and calculated to influe their minds and aggregate the college. The fore failly examined the revert, which is replace with dily care histories of the patient wile she can in the boundful on three questions, including conclaints registers by her, as their of trougate applied, as well as the detailed evidence of the various modical vitaments who testified on the harring, thile it appears to us that plaintiff usparationably materized never injuries in the seed ont, we have re shed the conclusion that the manifest country the evidence is against damages in the second for which judgment was entered, nile we realize that it is difficult to fix the specific smouth of damages sastained by plaintiff, we believe that a further recittion of 1), so sould fairly represent compensation for injuries succional by her. Therefore, if plantiff will file in this court like thirty days her communities of firther registritur of 15,000, julgamit will be entered here in her favor for illy one; other last the judgment will be reversed and dates remented to the Chronic court with alreations to ratry the cause on the sole issue of the question of College Cally

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Sulliven, P. J., and Scanlan, J., concur.

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40736

FANNIE G. ANDERSON,
Appellee,

v.

THE TRUST COMPANY OF CHICAGO,
a corporation,
Appellant.

Appellant.

305 I.A.623

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

September 23, 1925, plaintiff entered into written articles of agreement with H. O. Stone & Co. for the purchase of a subdivided lot in Cook county for which she undertook to pay the sum of \$1,200 in installments of \$13 each month. Payments of principal made to H. O. Stone & Co., up to August 30, 1929, in addition to monthly interest payments on the balance remaining due from time to time, as well as the payment of all assessments and real estate taxes in accordance with the terms of her agreement, reduced the purchase price to a balance of \$453.

May 5, 1929, Stone & Co. assigned the contract to Chicago
Trust Company as trustee under a so-called declaration of trust,
together with other contracts for the purchase of subdivided lots,
for the benefit of certain bondholders and for the uses therein
specified. Under this declaration of trust it was provided, among
other things, that the trustee would hold for the benefit of all
beneficiaries, of whom plaintiff was one, certain real estate which
the trustee agreed to manage and operate as a going liquidating real
estate business, and in which the trustee was designated to be the
legal and beneficial owner in fee simple. The trust agreement provided that any contract purchaser might obtain a deed from the trustee
upon complying with all the terms of his contract, and that all
collections under the contracts should be made by the trustee.

Subsequently, the Central Republic Bank & Trust Co. succeeded,

40736
FABRIE G. ARDERSON,
Appellee,
V.
COOK COUNTY.
A COPPERATE COMPANY OF CHICAGO,
A COPPERAT

MR. JUSTICE PRIEND DELIVERED THE OFINION OF THE COURT.

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May 5, 1929, Stone & Co. assigned the contract to Chicago trust Campany as trusts under a co-called declaration of trust, iopether with other contracts for the purchase of sublivided late, for the tenantic of certain handhalders and for the uses therein specified. Unser this declaration of trust it san provided, among other things, that the trustee would hold for the benefit of all benefiteries, of many plaintiff was one, certain real outst shigh the trustee agreed to manage and operate as a rotal liquidating real such trustees, and in ratch the trustee and decignated to be the legal and benefitial owner in few simple. The trust agrees wit provided that any contract purchaser might obtain a decignation for the trustee openions with all the terms of his contract, and that all contract should be made by the trustee.

Subsequently, the Control Republic Renk & Frust Co. susceeded,

by consolidation, to all the rights, obligations and duties of the Chicago Trust Company, and a legal decree entered in the consolidation proceeding provided that "any company into which the trustee may be merged shall be the successor trustee under this indenture, without the execution of any paper." In order to determine the extent of its powers relative to the contracts included in the trust, the Central Republic Bank secured an order or decree of court vesting it with power to demand and receive payments on contracts, modify the terms thereof and to employ agents to perform these various duties, and the decree at the same time approved an agreement between the Central Republic Bank as trustee and Chicago Title & Trust Co. whereby the latter was engaged as the agent of the former to perform these duties.

December 29, 1933, the present defendant, Trust Company of Chicago, acquired title to the lot in question by quitclaim deed from the Central Republic Bank, and on the same day, by an instrument in writing, accepted appointment as successor trustee and acquired the rights, powers and duties which had inured to its predecessor. January 1, 1934, defendant entered into a contract with Chicago Realty Finance Company, engaging it as agent with power to demand and receive all payments of principal and interest due under the pledged contracts, including plaintiff's, to serve notices of forfeiture, institute suits in the name of the Trust Company of Chicago, to enforce and collect payments under the contracts, and to reinstate, alter or modify them; and defendant secured the court's confirmation as to its right under the trust to enter into that agreement with Chicago Realty Finance Company. After plaintiff had made the substantial payments heretofore enumerated to M. O. Stone & Co. she continued to make payments to Chicago Title & Trust Company, as agent for the Central Republic Bank, and to Chicago Realty Finance Co., as agent for the Trust Company of Chicago, as successor in trust. From January 1, 1934, to and including February 18, 1937, plaintiff made payments regularly to Chicago Realty Finance Company, reducing the contract balance to \$299.16. After

by consolidation, to all the rights, obligations and duties of the Chicago Trust Company, and a legal decree entered in the consolidation proceeding provided that "any company into which who trustee may be marged shall be the successor trustee under this indenture, without the execution of any paper." In order to determine the entent of its powers relative to the contracts included in the trust, the Central Republic and receive payments on decree of court vesting it with power to demand and receive payments on contracts, modify the terms thereof and to employ agents to perform these various duties, and the decree at the same time approved an agreement between the Central Republic Bank as trustee and Chicago Title & Trust Co. whereby the latter was engaged as the agent of the former to perform these duties.

Describer 29, 1941, the process defendant, trust comment of ment been alsledly to nothern at for eds of while bettimen to entitle the Central Republic Bank, and on the same day, by an instrument in writing, accepted appointment as successor trustee and acquired the range, recessored and of benefit and sales and armore than its 1, 1934, defendant subored this a congract with Chicago healty ringues Company, engaging it as agent with power to demand and receive all paycours of principal and injurest one under the circum contracts, including plaintiff's, to serve motices of forfeiture, institute suits in the mame of the Trust Company of Chicago, to enforce and collect payments under the secteacits, and to rednotets, alter or southy though water this was ou as actionalize court to severe was a series bas the trust to enter into that agreement with Chicago Realty Finance Company. Arrow plaintift and have the supercented premits mericafore enumerated to H. O. Stone & Co. she continued to make payments to Chicago Title - Trust Commany, ... : you for the Dancyol Marabile Banks, to cannot forme and tol fings as ... Ob someth plant washin of box Delega, as accounted in trust. From Lamenty is 1914, to and including Coursey 15, 1977, sinkniff ands comments terminely to Chicago helly Physics Company, reducing the contract asients to 199,10, after

February 18, 1937, she made payments direct to defendant.

In the fall of 1935, while plaintiff was making payments to Chicago Realty Finance Company, Fred Adams, its vice-president, suggested that if she would pay up her contract in full, he would waive the interest and give her a deed. She was unable to do this, however, and Adams then told her that if she would continue to make her monthly payments, a deed would ultimately issue. Accordingly, from April 7, 1937, to January 26, 1938, plaintiff continued to make payments direct to the Trust Company of Chicago, defendant, and July 10, 1938, she tendered to defendant the unpaid balance due on her contract and demanded a deed. Defendant refused to make the conveyance, it having developed that it had previously conveyed the property to one Bruno Drake, and thereupon plaintiff filed suit August 24, 1938, to recover all the payments made by her to H. O. Stone & Co. and the various assignees. Trial by the court without a jury resulted in a finding and judgment for plaintiff in the sum of \$3,049, from which defendant appeals.

As the principal ground for reversal it is urged that the assignment of a contract for the sale of land does not impose a personal liability upon the assignee in the absence of an express agreement to assume the obligation, especially where the assignment is for security. Numerous cases are cited by defendant in support of this proposition, but in none of them do we find a situation where the assignee has promised to carry out the contract or where, as here, the property has been conveyed so that the contract could not be carried out. When on May 5, 1929, Stone & Company assigned plaintiff's contract to Chicago Trust Company, as trustee, the written assignment which was contained in the so-called declaration of trust recited that A. O. Stone & Co. "does hereby convey, grant, bargain, sell, assign, transfer and deliver unto Chicago Trust Company, as trustee, all the following contracts," listing plaintiff's agreement, "to have and to hold said contracts unto said trustee and to its successors for the benefit of the bondholders and for the uses of the trusts hereinafter stated." One of the articles of

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the trust provided that the trustee should possess, manage and open the lands and contracts as a going, liquidating real estate business "it being intended hereby that the trustee shall be deemed to be the legal and beneficial owner in fee simple; that any contract purchaser may obtain a deed from the trustee upon complying with all the terms of their contract; and that all collections on the contracts should be made by the trustee." This we think was an undertaking by the Chicago Trust Company, as the first successor to H. O. Stone & Co. to carry out the contract and to deal with plaintiff, among others, in accordance with the undertaking of the original vendor.

When Central Republic Bank next appeared in the chain as successor in title it assumed like responsibilities and duties toward the trust property and plaintiff, and in order to determine the extent of its powers relative to the various purchase contracts it secured a decree of court providing that it had the power to demand and receive payments on the contracts, modify the terms thereof, and to employ agents to perform these various duties; and pursuant to this decree it employed Chicago Title & Trust Co. as its agent, who received from plaintiff payments on account of her purchase agreement.

Subsequently, in December, 1933, the present defendant, Trust Company of Chicago, acquired title to the lot covered by plaintiff's contract, through a quitclaim deed from Central Republic Bank & Trust Company, and thereafter appointed Chicago Realty Finance Company as its agent under an agreement which authorized the latter to receive payments of principal and interest under the pledged contracts, to serve notice of forfeiture, reinstate, alter and modify the agreement; and substantial payments were made by plaintiff to the Chicago Realty Finance Company pursuant to this arrangement. The record also discloses that a court order authorized and approved the appointment of Chicago Realty Finance Co. by the present defendants.

Thus, these various assignees undertook to carry out plaintiff's original contract, and payments were made by her and accepted by them from time to time. Consequently, when she had reduced the principal

the trust provided that the trusted should possess, manage and open the lands and centracts as a going, liquidating real estate business, "it being intended hereby that the trustee shall be deemed to be the legal and beneficial owner in fee simple; that any contract purchaser may obtain a deed from the trustee upon complying with all the terms of their centract; and that all collections on the centracts should be made by the trustee." This we think was an undertaking by the Chicago Trust Company, as the first successor to H. G. Stone & Go. to carry out the centract and to deal with plaintiff, among others, in accordance with the undertaking of the criginal vendor.

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Realty Finance Co. by the present defendants.

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to \$299.16, and tendered the balance to defendant, she was entitled to a deed and the only reason assigned for the refusal of defendant to deliver a deed, aside from the legal ground heretofore stated, was that the property had previously been conveyed to Drake. To hold under the circumstances of this case, that the various assignees, including the present defendant, had not expressly assumed the liability of carrying out the agreement of H. O. Stone & Co., would be a denial of justice, since defendant's predecessors in title are no longer in existence. Defendant argues that it is not liable for the payments made to H. O. Stone & Co., the Chicago Trust Co., and the Central Republic Bank & Frust Company, and that it can be made to respond only for the payments made by plaintiff directly to defendant and its agent, the Chicago Realty Finance Company. We think this argument overlooks the inference that may fairly be drawn from the evidence that it had assumed the contract and was bound to carry out its provisions when plaintiff had tendered the small balance remaining due. (McGill v. Baker, 266 Pac. 138, 147 Wash. 394; Brady v. Fowler, 45 Cal. App. 592, 188 Pac. 320; Davidson v. Baker Fuel Oil Burner Co., 16 La. App. 339, 134 Southern 108.)

The Illinois decisions, <u>Lunt v. Lorscheider</u>, 285 Ill. 589, and <u>Forthman v. Deters</u>, 206 Ill. 159, and others cited by defendant merely hold that an assignee does not become liable on an executory contract unless by his agreement he assumes such liability. None of these cases, however, rested on a state of facts where an assumption of the agreement could be fairly presumed. The chain of circumstances in the case at bar clearly indicate an assumption of the undertaking by each of the assignees, including defendant, and distinguish this case from the decisions cited and discussed by defendant. Moreover, the Central Republic Bank and the Trust Company of Chicago both had decrees entered, providing that they had the power to enforce all the provisions of plaintiff's contract, and having had a court determination of their power they proceeded to collect the money due on the contract from plaintiff.

to \$299.16, and tendered the balance to defendant, she was entitled to a deed and the only reason assigned for the refusal of defendant to deliver a deed, aside from the legal ground here of ore stated, was that the property had previously been conveyed to brake. To hold under the elreumstances of this case, that the various assignees, industrie the present detection, and are expressly encount the liability of carrying out the agreement of N. O. Stone & Co., would be a denial of justice, since defendant's predecessors in title are no longer in existence, Defendent argues that it is not liable for the payments made to M. O. Stone & Co., the Chicago Trust Co., and the Central Republic Mank & Trust Company, and that it can be made to respond only for the payments made by plaintiff directly to defendant and hos apport, the dilabora Newlty Plantac Company, we think this argument overlooks the inference that tay fairly be drawn from the ovidence that it had assumed the contract and was bound to carry out its provisions when plaintiff had tendered the small balance remaining doe. (Andill v. later, 266 cas. 138, 147 mes., 194) medy-v. poular. ef sel. Aug. 592, 183 tes. 500; Lawidenn v. Seine Sual oil purper co., 16 La. App. 339, 134 Southern 168.;

In the series of the accumentation of the contract united that an assignee does not become liable on an executory contract unites by his agreement he accumes such liability. None of these cases, however, rested on a state of facts where an assumption of the agreement could be fairly presumed. The chain of circumstances in the case at her clearly indicate an assumption of the undertaking by each of the assignees, including defendant, and distinguish this case at her will be in the case in the provincions of their power they proceeded to collect the money due on the con-

During the period of thirteen years from the signing of the agreement in 1925, until 1938, there had been no forfeiture of the agreement, but on the contrary representations had been made to plaintiff by the successive assignees or their agents that upon completion thereof a deed would issue, and these representations were made to plaintiff from time to time as she made payments to the various assignees. The amount of the judgment is not questioned, but it embraces payments of principal, interest, special assessments and general taxes over a period of many years. Various other points are raised, which have no bearing, however, on the conclusions reached.

Plaintiff's additional abstract supplies evidence from the record showing the assumption of plaintiff's contract by the various assignees. This documentary evidence was not shown in the original abstract, although it was extremely important to a proper determination of this cause. Therefore plaintiff should be reimbursed for the expense of preparing and filing her additional abstract and the cost thereof is accordingly taxed against defendant. For the reasons given we think the court properly entered judgment in favor of plaintiff. The judgment is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

Unving the period of thirteen years from the signing of the agreement in 1925, until 1936, there had been no forfeiture of the agreement, but on the controly representations had been made to plaintiff the time to time as she made to the ware made to plaintiff from time to time as she made payments to the various assignees. The amount of the judgment is not questioned, but it embraces payments of principal, interest, special assessments and general taxes over a period of many years. Verious other points are raised, which have no berring, however, on the conclusions reached.

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Sullivan, P. J., and Nosmion, J., concur.

40965

ALFRED JOHNSON, Appellee

V.

EDWARD BALMES, Appellant.

APPEAL FROM COUNTY COURT,

305 I.A. 623

MR. JUSTICE FRIEND DELIVERED THE OPICION OF THE COURT.

Plaintiff, Alfred Johnson, brought suit against Edward Balmes, defendant, for damages to his automobile resulting from a collision with defendant's milk truck on plaintiff's premises. Balmes filed a counterclaim for damages to his vehicle, and for milk spilled and eggs broken as the result of the collision. The suit was originally tried before a justice of the peace, pursuant to a jury waiver by both parties, resulting in findings and judgment in favor of plaintiff for \$112.60 and the dismissal of defendant's counterclaim. An appeal was taken to the county court. A trial de novo without a jury again resulted in judgment for plaintiff of \$112.60 and costs, and the dismissal of defendant's counterclaim. This appeal by defendant followed.

The essential facts disclose that the collision occurred in the foremoon on October 20, 1937, in the Village of Glen View, where plaintiff then resided. From a plat introduced in evidence, it appears that Johnson's residence was situated to the south of a highway and was accessible through a private driveway, approximately 100 feet in length, leading in a southerly direction toward the residence. This driveway was about ten feet in width for the first thirty or forty feet, and then swung toward the west in a circular direction along plaintiff's residence, around an "island" situated in front of the residence, back in an easterly direction to a garage, and then straight along the opposite side of the island in a straight line

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Finish II, it is automobile resulting from a cellision defendant, for damages to his automobile resulting from a cellision with account to damages to his vehicle, and for milk spilled and eggs broken as the result of the cellision. The suit was originally tried before a justice of the peace, pursuant to a jury waiver by both out is, relied to the dismissal of defendant's counterclaim. An appeal action as the dismissal of defendant's counterclaim, An appeal countered in judgment for plaintiff of \$112.60 and costs, and the dismissal of defendant's counterclaim. This appeal by defendant for plaintiff of \$112.60 and costs, and the dismissal of defendant's counterclaim. This appeal by defendant

The essential facts disclose that the collision occurred in the foremoon on October 20, 1937, in the Village of Clen View, where Walnut Common's residence was situated to the south of a highway and that Johnson's residence was situated to the south of a highway and that Johnson's residence was situated to the south of a highway and according to the first thirty or forty driveway was about ten feet in width for the first thirty or forty feet, and then swang toward the west in a circular direction along plithing; registers, around an "island since in from or the residence, back in an easterly direction to a garage, and then straight along the opposite side of the island in a straight line

where it connected with the driveway leading in from the main highway.

Balmes, who was engaged in the business of selling milk, butter and eggs, had been making deliveries at plaintiff's home for about four years. On the morning in question, after having delivered milk to plaintiff's residence, he was driving his Dodge delivery truck around the curve in a northeasterly direction toward the main highway, at a rate of speed described .s 5 to 6 miles an hour, and collided with plaintiff's Pontiac automobile, which was then being driven by plaintiff from the highway toward his residence at approximately 15 miles an hour. The collision occurred at a curve where the driveway widens to approximately 10 feet. The view of both parties was obstructed at the curve by some dense shrubbery which made it impossible for either driver to see the other until immediately preceding the impact. Plaintiff contends, and both courts evidently found as a matter of fact, that defendant was negligent in failing to follow the law of the road and keep to the right, and that this act of negligence was the proximate cause of the damage which plaintiff sustained; that defendant, although an invitee, was bound to exercise reasonable care while on plaintiff's driveway, and is liable in damages for his failure so to do; and that plaintiff exercised the ordinary and reasonable care which the law required.

The several grounds for reversal all relate to questions of fact involving the relative negligence of the parties and their exercise of ordinary care in driving around the curve where the collision occurred. Defendant argues that the finding of the court is contrary to the manifest weight of the evidence; that plaintiff was not in the exercise of ordinary care; that in permitting the shrubbery and trees at the curve of the driveway to obscure vision raises a presumption of negligence and a want of due care; and that the plaintiff was further negligent in not posting a sign or giving instructions to persons using the driveway. All these contentions resolve themselves into questions of fact which the trial court was

where it connected with the drivewey leading in from the main highway.

Belmes, who was engaged in the business of selling milk, butter and eggs, had been making deliveries at plaintiff's home for about On the morning in question, efter having delivered milk four years. baintiff's residence, he was driving his Dodge delivery truck cround the curve in a northeasterly direction toward the sain highway, at a rate of speed described as 5 to 6 miles am hour, and collided with plaintiff's Pontiac automobile, which was then being driven by plaintill from the highway toward his residence at approximately I wiles an hour. The collision occurred at a curve where the driveway widens to approximately 16 feet. The view of both parties was obstructed at the curve by some dense shrubbery which made it impossible for .josqui eni gallesse q ylestilemmi Litur redte ent es to revite To reitends, and bein courts evidently found as a matter to wal end wollog of gailian at Jagailyen aww Jacone of the Last, the the road and keep to the right, and that act of negligence was the provincte cause of the demage which plaintiff sustained; that defendent, although an invitee, was bound to exercise reasonable care while on plaintiff's driveway, and is liable in damages for his failure Find allegrand and granting and buildings Tilfutale fadd but you at shoulder the less required;

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in a better position to determine than an appellate tribunal. Defendant had been making deliveries to plaintiff's residence for four years, and must have been fully cognizant with the typography of the driveway and the danger presented by the shrubbery at the curve where the accident occurred. The ultimate and determining question in the case is whether defendant was negligent in failing to keep to the right as he was leaving the circular portion of the driveway. The driveway at the point of impact was sixteen feet wide, which would have given defendant ample room to swing to the right and thus avert the collision. The trial judge who heard and had an opportunity to observe the witnesses was evidently of the opinion that defendant's negligence in failing to keep to the right was the preximate cause of the collision. The evidence adduced by the respective parties on this question is conflicting and we would not be justified in disturbing the finding of the trial judge and holding that it was contrary to the manifest weight of the evidence. The judgment should be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

in a better position to determine than an appellate tribunal, defendeand been making deliveres to plaintiff's residence to four years. wavevire on the commission with the treatment for the drivewer and the danger prosented by the shrubbory at the curve where the eact dent occurred. The ultimate and determining question in the case idair ont of good of wailist at inexilate ass insheds toutedw at as he was leaving the circular portion of the driveway. The driveway at the point of impact was sixteen feet wide, which would have given defendant ample room to swing to the right and thus evert the collision. The trial judge who heard and had an opportunity to also content the relation of the content of the content of the version sense daminor to keep to the right was the proximate cause of the collision. The syldence adduced by the respective carries on this question is conflicting and we would not be justified in disturbing the finding of the trial judge and holding that it was configure to the manifest weight of the evidence. The judgment should be affirmed. It is so ordered.

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Sullivan, P. J., and Seanlan, J., concur.

40996

FREDERICK L. REGNERY, Appellant,

V.

CHRIS-CRAFT BOAT SALES, Inc., a corporation, and JOHN P. HODI, appellees.

APPEAL FROM CIRCUIT COURT,

305 I.A. 624

WR. JUSTICE PRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order of the Circuit court sustaining defendants' motion to strike the amended complaint and dismissing the cause. Briefly stated, the amended complaint alleged that in January. 1938, plaintiff purchased from John P. Rodi and Chris-Craft Boat Sales, Inc., a yacht, known as "Hawk II," and paid therefor the sum of \$10,270; that subsequently defendants delivered a bill of sale to plaintiff and the yacht was shipped from its place of manufacture to Reith Boat Yards, in Chicago, and was there received about April 1. 1938; that on the date of its arrival plaintiff and hodi, who was president of the Chris-Craft Boat Sales. Inc., took the yacht on a trial run into Lake Michigan, during which there developed certain vibrations, caused by improper adjustment of the engines, whereupon Rodi agreed on behalf of defendants to make the necessary repairs and adjustments; that pursuant to this agreement plaintiff delivered the yacht to defendants April 2, 1938, it being agreed that they would exercise due care and caution to safeguard the yacht while it was in their possession, and return it in good condition; that from April 2 to April 5, 1938, the yacht was moored in the basin on the north side of lavy pier in Chicago, and while in possession and control of defendants, and due to their negligence and failure to exercise due and proper care therefor, the yacht suffered considerable damage during the night of spril 5th and 6th, by striking her port side against the dock and pier to which she was tied; that a portion of the dock gave way, causing the yacht to swing about and strike her starboard side

MR. JUSTICE PAIMED DELIVERED THE OFFICE OF THE COURT.

galmisiana frace fluoric ent lo webro ne mort algoges filinisis and and an in the contract the contract of the contract of the contract the Briefly stated, the amended complaint alleged that in January, 1932, plaintill purshased from John F. Eadl and Guela-Greit Book along Inc., a yacht, known as "Mark II." and paid therefor the sun of of else to flid a berevileb simebretob ylinespoudse fait : OYS.OLI to subjective the years was short beggins as the place to be an intimise to Little Beat Yards, in Chicago, and was there received about Arris ! 29 and the date of its arrived plaintiff and held, the president of the Chris-Craft Nest Sales, lac., took the yacht on a trial run into Lake Michigan, during which there developed certain vibrations, caused by improper adjustment of the engines, whereupon Rodi arreed on behalf of defendants to make the necessary repairs and edf beteviled Thinkelq inemetys aidf of inemetyq indi ; ainemizuthe plucy wait tad beerge guied it . 1932, it being egreed that they would the saw it elide into yet be selected to select the year of the case of the same of the sa S first mort fail to the condition of the first and acceptance and to April 5, 1938, the yacht was moored in the beat no the more of -tooled to located and sails in gomestar and other to tooled at ants, and due to their negligence and failure to exercise due antan proper care therefor, the yacht suffered considerable damage during the night of and 5th and oth, by stricting her got alde against the way which the doct tent a fact theth of the dock garage while brandrais the saint about and strike her starbeard able

against the dock and pier, with resultant damage to her hull, topsides, tail shafts, propellers and engines.

Defendants' assign the following ground in support of their motion to strike the amended complaint: "That plaintiff, in paragraph 9 of his amended complaint concludes that defendants were negligent in handling plaintiff's yacht, but failed to state specifically the manner in which they were negligent."

The principal question presented is whether plaintiff's amended complaint sufficiently states a cause of action in bailment for damage to his yacht. This raises the query whether in an action in bailment it is necessary for the bailor to plead specific acts of negligence on the part of the bailee. As a general rule, where goods delivered to a bailee are returned in a damaged condition, or not returned at all, the law presumes negligence on the bailee's part, unless he shows that the loss did not result from his negligence. In the recent case of Lederer v. Railway Terminal, 346 Ill. 140, suit was brought against a bailee for the loss of several cases of whisky, and in discussing the generally accepted rule of law applicable to cases of this kind, the court said (p. 145): "Where a bailor proves that he has stored goods in good condition with a bailee and they are returned to him damaged or not returned at all, the law presumes negligence on the part of the bailee unless he shows that the loss did not result from his negligence." The court pointed out as the reason supporting this rule that the bailor had no access to the warehouse and was not in posit on to know what caused the fire. "The whisky was deposited with (the bailee) in good condition and was damaged while in its possession. This proof made a prima facie case under the first and second counts of the declaration."

In <u>Miles v. International Hotel Co.</u>, 289 III. 320, the guest of a hotel brought suit for damage sustained to personal property left with the innkeeper under a bailment, and in discussing the liability of the defendant, the court said (pp. 327, 328): "The weight of modern authority holds the rule to be that where the bailor has shown that

against the dock and pier, with resultant damage to her hull, topsides, tail shafts, propollers and engines.

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the goods were received in good condition by the bailee and were not returned to the bailor on demand the bailor has made out a prima facie case of negligence against the bailee, and the bailee must show that the loss or damage was caused without his fault."

In Schaefer v. Safety Deposit Co., 281 Ill. 43, plaintiff sued for the loss of money left in a safety box which was in the exclusive possession and control of defendant. The court pointed out the circumstances and said that there appeared no reason to depart from the ordinary rule that, "where a bailee receives property and fails to return it the presumption arises that the loss was due to his negligence, and the law imposes upon him the burden of showing that he exercised the degree of care required by the nature of the bailment. *** To call upon the plaintiff, under such circumstances, to prove some specific act of negligence by which her money was lost, and which she must necessarily prove by defendant's employees, would impose upon her a practically impossible burden." Other cases to the same effect, cited in plaintiff's brief, are More v. Fisher, 245 Ill. App. 567, and McCurrie v. Hines Lumber Co., 178 Ill. App. 617.

The allegations of the amended complaint fall logically within the authorities cited. It is alleged that in accordance with the agreement between plaintiff and defendants, the plaintiff "*** delivered said yacht to the said John P. Rodi and Chris-Craft Boat Sales, Inc., for the purpose of making the repairs and adjustments agreed upon; that it was also further understood and agreed *** that the said Rodi and Chris-Craft Boat Sales, Inc., would exercise due care and caution to safeguard the said yacht while in their possession; and that while the yacht was in the possession and control of *** Rodi and Chris-Craft Boat Sales, Inc., for the purpose of making the repairs and adjustments agreed upon, damage resulted."

Defendants seek to avoid the legal effect of the presumption cast upon them by arguing that the amended complaint fails to allege that the yacht was delivered into the exclusive possession of the

the goods were received in good condition by the bailed and were not returned to the bailor on demand the bailor has made out a prima facie case of negligence against the bailee, and the bailee must show that the loss or damage was caused without his fault."

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Defendants seek to avoid the legal effect of the presumption when upon those by arguing that the complaint fails to silege that the yacht was delivered into the exclusive possession of the

bailees, but the allegations hereinbefore set forth clearly rebut this contention; no other reasonable meaning can be taken from the averments of the amended complaint.

It is also argued that "where it affirmatively appears from the complaint that plaintiff has knowledge concerning the cause of the damage to goods delivered to defendant and returned to plaintiff in a damaged condition, no cause of action is tated unless the negligence of the defendant is specifically alleged in the complaint." Plaintiff does allege general negligence, and presumably that is as much as he is required to allege under the law and circumstances of this case. It is averred that he delivered the yacht to defendants as bailees: that it was tied to their pier and damaged because of the force of wind and sea, which caused the yacht to swing around and strike the side of the dock. Presumably plaintiff had no specific knowledge as to the cause of the loss, but only as to the resulting damage. Under the authorities the presumption of negligence arises and the burden is cast upon defendants to show that they were not negligent. Such a showing could only be made upon a hearing of the issues.

Lastly, it is argued that defendants are exempted from liability because the damage was due to violence or natural causes. It seems to us, however, that since defendants were engaged in the business of the sale and repair of watercraft, and presumably knew the perils which may befall a yacht improperly anchored or tied, they may well be guilty of negligence, where the yacht is subjected to damage by reason of natural causes such as wind, tide or heavy sea, unless they can show by competent evidence that they were not negligent.

We think the court erred in sustaining defendants' motion to strike and in dismissing the amended complaint. The order of the Circuit court is therefore reversed and the cause remanded, with directions to overrule defendants' motion to strike, and for such other proceedings as are consistent with the views herein expressed.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

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We think the court erred in sustaining defendants' motion to strike and in dismissing the amended complaint. The order of the Circuit court is therefore reversed and the cause remanded, with directions to everule in a motion to strike, and for such other proceedings continued.

Alv , J., and Seanlan, J., concur.

41026

LESSING ROSENTHAL, F. HOWARD SLDRIDGE, WILLARD L. AING and SIDNEY ROBIN, as surviving partners of the firm and copartnership of ROSENTHAL, HAMILL & WORMSER,

Appellees,

APPEAL FAOM MUNICIPAL COURT OF ORICAGO.

PAUL C. LOEBER,

Appellant.

305 I.A. 624

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order of the Municipal court denying his motion to vacate a default judgment for \$1,337.47 and costs, entered in favor of the several plaintiffs as surviving partners of the firm of Rosenthal, Hamill & Wormser.

Suit was brought on a promissory note executed by defendant February 27, 1932. Summons issued April 20, 1939, the return thereon reciting that defendant had been personally served.

Judgment was entered in favor of plaintiffs and against defendant on April 28, 1939. More than two months later defendant, pursuant to notice, filed his verified petition to vacate the judgment, wherein he set forth at length what purported to be a meritorious defense to the note, denied that service had been had upon him, prayed that the judgment be vacated, that he be granted leave to file his appearance and defense and heard concerning his rights in the premises. The court denied the petition and defendant has taken an appeal.

Aside from the contention that he had a meritorious defense, the sole ground urged for reversal is that "a judgment obtained by means of a false return by an officer, without notice to defendant, will be set aside by a court of equity, where it is shown that the judgment is inequitable and unjust."

It is argued that defendant was entitled to all the relief

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COUNT OF CHICKEO.

PAUL C. LOEBER,

Appollant.

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the sole ground urged for reversal is that "a judgment obtained by
means of a false return by an officer, without notice to defendent,
will be set aside by a court of equity, where it is shown that the
judgment is inequitable and unjust."

It is argued that defendant was entitled to all the relief

in the Municipal court that he would have been entitled to had he filed a complaint in equity, and that the Municipal court had jurisdiction under section 21 of the Municipal Court Act (chap. 37, par. 376, Illinois State Bar Stats. 1939, p. 1062), after the expiration of thirty days to vacate and set aside the judgment and afford defendant a hearing on the merits.

The difficulty with the argument advanced is that the petition makes no showing that the judgment was obtained without notice to defendant, or that it was inequitable or unjust. The allegation as to lack of service is stated as a legal conclusion. No facts are set forth tending to support it. It is not alleged that defendant did not have knowledge of the service reported by the bailiff on his return, nor when defendant first learned of the pendency of the suit or the entry of the judgment, or that defendant exercised due diligence, either before or after the judgment was entered. Defendant merely sets forth the bare conclusion that he was not served, but the bailiff's return shows personal service upon him. Furthermore, plaintiffs' counsel say in their brief that defendant had knowledge of the suit following the bailiff's visit, "because we have a letter signed by defendant requesting a continuance before the judgment was entered." They offer in their brief to produce the letter in evidence under section 92d, par. 216, of the Practice Act (III. State Bar Stats. 1939, chap. 110), but we do not think it necessary to permit the introduction of this letter. The law is well settled that the right of a court of equity or of the Municipal court, under section 21 of the act, to set aside a judgment obtained on the basis of an alleged false return of the sheriff ends after the term, unless the false return has been procured by the fraud of the plaintiff. The case of Travelers Insurance Co. v. Wagner, 279 Ill. App. 13, is precisely in point. In that proceeding judgment was entered February 16, 1934. April 6 of that year defendant filed a petition to vacate the judgment pursuant to the provisions of the Civil Practice act, which gave the trial court the same power to grant equitable relief

in the Municipal court that he would have been entitled to had he filed a complaint in equity, and that the Municipal court had jurisdiction under section 21 of the Municipal Court Act (chap. 37, per. 376, Illinois State Der State. 1939, p. 1062), after the expiration of thirty days to vacate and set aside the judgment and afford defendant a hearing on the merits.

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with respect to judgments as is given the Municipal court by section 21 of the Municipal Court Act. The prayer of the petition was granted and the judgment was vacated. Thereafter the case was dismissed for want of prosecution and an appeal was taken. The petition in that case, among other ground for relief, alleged that the sheriff's return did not show correctly the date on which summons was served. The court held that the petition was not sufficient, and said that "parties are bound by the sheriff's return after the term is ended in which judgment is entered unless a false return has been procured by the fraud of plaintiff."

In the case at bar the question of the meritorious defense was not in issue. Petitioner merely stood upon his legal rights and contended that the court did not have jurisdiction over him. Neither in this case nor in <u>Travelers Ins. Co. v. Wagner</u>, supra, was there any showing that defendant was not guilty of negligence or laches, and therefore the conclusion reached in the latter decision is applicable to the case at bar.

In the leading case of Chapman v. The North American Life
Ins. Co., 292 Ill. 179, defendant, after the expiration of the term
sought to prove that the sheriff's return did not state the facts.
The court refused to entertain the petition, and said (p. 187):
"In this State, before judgment is taken the sheriff's return can be
contradicted when a false return is taken advantage of by a plea in
abatement, or, more properly speaking, by a plea to the jurisdiction
of the court of the person of the defendant. (Sibert v. Thorp, 77
Ill. 43.) all the cases will be readily distinguished that have been
cited to us on the question of a sheriff's return, by noting that
after judgment has been rendered, and after the term has ended in
which judgment was rendered, the sheriff's return is conclusive as
between the parties and cannot be taken advantage of by error coram
nobis unless such false return has been procured by the fraud of the
plaintiff."

Under the established rule in equity the court may afford

with respect to judgments as is given the Euricipal court by section 21 of the Euricipal Court Act. The prayer of the petition was granted and the judgment was vacated. Thereafter the case was dismissed for want of prosecution and an appeal was taken. The petition in that case, among other ground for relief; alleged that the sheriff's return did not show correctly the date on which summons was served. The court held that the petition was not sufficient; and said that "parties are bound by the sheriff's return after the term is ended in which judgment is entered unless a false return has been precured by the fraud of plaintiff."

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relief in a proper case against a judgment at law, but it must first appear that the party complaining has not been guilty of negligence or laches, and that he has been prevented from interposing a defense through accident, fraud or mistake, without fault or blame on his part (Miggins v. Bullock, 73 III. 205; Owens v. Ranstead, 22 III. 161; Stasel v. The American Home Security Corporation, 362 III. 350), and the same rule is applicable to petitions filed under section 21 of the Municipal Court Act.

Moreover, under the well established rule in this and other jurisdictions, the return of service by a sworn officer will not be lightly set aside on the basis of the oath of the one who is alleged to have been served. The proper method of hearing petitions under section 21 of the Municipal Court Act, where an attack is made upon the service of the bailiff, is to furnish supporting affidavnts of the circumstances. (Domitski v. American Linseed Co., 221 Ill. 161; White Oak Coal Co. v. Beck, 175 Ill. app. 36.) This rule has been repeatedly approved in this State in proceedings of this nature since the early case of Brown v. Brown, 59 Ill. 315.

We are of opinion that because of the failure of petitioner to allege facts in his petition entitling him to relief, as well as his failure to offer supporting affidavits, the petition was properly denied, and the order of the Municipal court is affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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Sullivan, F. J., and Scanlan, J., concur.

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ISORA McNULTY,
Appellee,

V.

LEWIS A. REINERT and ROBERT CLARKE, doing business as the ALEXANDRIA HOTEL, Appellants.

APPEAL FROM SUPERIOR COURT,

305 I.A. 625

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action in tort for personal injuries suffered by plaintiff while a passenger in a passenger elevator of defendants in the lexandria hotel, in Chicago. A jury returned a verdict finding defendantsguilty and assessing plaintiff's damages at +7,500. Defendants appeal.

Defendants contend: "The doctrine of res ipsa loquitur raises only a presumption or inference of negligence which vanishes entirely when any evidence appears to the contrary. Any such presumption was clearly rebutted in the case at bar and the trial court should have directed a verdict for the defendants at the close of all the evidence."

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant [plaintiff]. Yess v. Yess, 255 Ill.

414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489."

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APPEAR FOR SOURT

305 LA. 625

IR. JUSTICE SCARLAN DELIVERED THE OFICION OF THE COUNT.

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(Munter v. Troup, 315 III. 293, 296, 297.) See, also, Mahan V.

Richardson, 284 III. App. 493, 495; Thomason v. Chicago Motor Coach

Co., 292 III. App. 104, 110; Wolever v. Curtiss Candy Co., 293 III.

App. 586, 597.

In support of their contention defendants do not cite any passenger elevator cases.

"There is no employment where the law demands a higher degree of care and diligence than in the construction and operation of passenger elevators. Their operation is necessarily to some extent dangerous. The control of the operator is absolute and the passenger is helpless as far as self-preservation is concerned. Powerful agencies of locomotion are employed while often the speed of travel is swift and the height attained is perilous. Therefore, the highest degree of human care and foresight is required of those engaged in either the construction or operation of passenger elevators and they are responsible for the slightest negligence." ('ebb's The Law of Passenger and Freight Elevators (2d ed.), p. 7.)

In the reports of the appellate courts and the Supreme court of this State many passenger elevator cases may be found.

In Hartford Deposit Co. v. Sollitt, 172 Ill. 222, the court said (p. 225): "Persons operating elevators are carriers of passengers, and the same rules applicable to other carriers of passengers are applicable to those operating elevators for raising and lowering persons from one floor to another in buildings. It is a duty of such carriers of passengers to use extraordinary care in and about the operation of such elevators, so as to prevent injury to persons therein. The fact of the falling of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faultily constructed, and the instruction in this case, in alleging that the plaintiff was in the elevator for the purpose of being carried from one floor to another, and that the elevator, owing to its negligent and faulty construction

(Municor v. areans, 315 % 11. 295, 290, 297.) See, also, Makey V.

Minhwerkeen, 284 111, 45p. 401, 4091 incommon v. anicamon motor Conch

Co., 292 111, App. 104, 1101 mattern v. Ourties dunks Co., 293 111.

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or to the negligence and carelessness on the part of the servants in operating the same, fell, and caused an injury to the plaintiff, stated a correct proposition of law, and stated a liability for causes alleged by the counts of this declaration." (Italics ours.)

In <u>Springer v. Ford</u>, 189 Ill. 430, the court said (pp. 434, 435, 436):

"At the close of the plaintiff's testimony, and again at the close of all the testimony, the defendant moved the court to instruct the jury to find the defendant not guilty, which the court declined to do, and the action of the court in that behalf has been assigned as error.

"The law is well settled that persons operating elevators in buildings for the purpose of carrying persons from one story to another are common carriers of passengers. [Citing cases.] * * *

"The operators of such elevators, upon the grounds of public policy, are required to exercise the highest degree of care and diligence. The lives and safety of a large number of human beings are entrusted to their care, and the law requires them to use extraordinary diligence in and about the operation of such elevators to prevent injury to passengers being carried therein. * * *

"When a passenger is injured by reason of the giving way of some portion of the machinery or appliances by which the elevator is operated, the presumption of negligence from such breaking, unexplained, arises. In New York, Chicago and St. Louis Railroad Co. v.

Blumenthal, 160 Ill. 40, we say on page 48: 'The happening of an accident to a passenger during the course of his transportation raises a presumption that the carrier has been negligent. The burden of rebutting this presumption rests upon the carrier. Undoubtedly, the law requires the plaintiff to show that the defendant has been negligent. But where the plaintiff is a passenger, a prima facie case of negligence is made out by showing the happening of the accident.

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If the injury to a passenger is caused by apparatus wholly under the control of the caprier and furnished and applied by it, a presumption of negligence on its part is raised. And in Martford Deposit Co. v. Sollitt, supra, it is said (p. 225): The fact of the falling of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faultily constructed. (Italics ours.)

In Steiskal v. Field & Co., 238 III. 92, the court said (p. 98): "This court has held (Martford Deposit 2c. v. Sollitt, 172 III. 222, and Stringer v. Ford, supra,) that a person operating a passenger elevator under the circumstances under which the elevator in question was being operated at the time of the accident is a carrier of persons and bound to exercise a high degree of care in transporting passengers, and that the fact that the elevator falls when persons are being carried thereon is evidence that the elevator was mismanaged or was out of repair or of faulty construction." (Italies ours.) See, also, Chicago Exchange Fuilding Co. v. Ielson, 197 III. 234, 239; Beidler v. Branshaw, 200 III. 425, 429.

It follows from the aforesaid decisions that "the fact of the falling of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faultily constructed."

Plaintiff lived at Waukesha, Wisconsin. The accident happened on the afternoon of May 3, 1936. She boarded the elevator on the fourth floor of the hotel with her daughter, Mary McMulty; her daughter's friend, Frank Bucci; her son, William McMulty; her husband, Joseph McMulty; her sister, Mrs. J. Evans; and Robert Schram, a minor child. Two guests in the hotel were also in the elevator. John Cullen was the operator of the elevator. He was a candy maker by trade and at the time of the trial had been employed for eight months as a candy maker. When he started working at the Alexandria hotel in March, 1936, as an elevator operator it was his first experience in operating an elevator.

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Sometime after the accident - date not fixed - he was employed by defendants in the hotel as a "bell hop." Plaintiff and her party intended to leave the elevator on the first, or lobby floor, and one of the party requested Cullen to let them off at that floor. All of the passengers desired to alight at that floor. From the time that plaintiff sot on the elevator until 1t struck the bottom of the shaft in the basement it did not stop, although persons desired to get on the elevator at the third floor, and Cullen admitted that he "had room for a couple more or so. " The great preponderance of the evidence shows that after Cullen released the control at the fourth floor the elevator descended with rapidly increasing force until it hit the bottom of the shaft. One of plaintiff's witnesses testified that it hit the bottom with "a terrific crash." Another testified that it was like "hitting up against a cement wall," "a very hard blow," that "jarred" the witness. Another testified that when it hit the bottom it seemed to her that they "were going through the floor." Another testified that "we struck the bottom very hard, * * * When the elevator hit the bottom it just felt like something had pushed my head and neck down to my feet." One of plaintiff's witnesses testified that as the elevator was descending Gullen "switched the control back into reverse and it had no effect. It increased in momentum at the same time. * * * The control seemed to shift a little bit, as he moved it into reverse, and then he moved it back into high, and as he moved it back into reverse it had no effect." Another witness for plaintiff testified that as they were descending she saw the elevator operator "shake" the lever, but "the car just shook us and the car just kept going faster and faster and faster until we landed." Another witness for plaintiff testified that as the elevator reached the third floor there was a passenger waiting there to get on and Cullen tried to stop the elevator; that "he shifted the control lever on the elevator, and we just continued. The elevator man moved the lever horizontally. * * * The elevator just continued to drop on; it did not stop. * * * It was at the third floor where he

Sometime after the accident - date not fixed - he was employed by defendants in the hotel as a "boll hep." Flaintiff and her perty intended to leave the elevator on the first, or lobby floor, and one of the party requested Cullen to let them off at that floor, all of the passengers desired to alight at that floor. From the that the flade ont to motion of the clevator until it struck the motion of the in the basement it did not stop, although persons desired to get on meer bad" and that the malle of the coll bath and the reverse of for a couple more or so." The great preponderance of the evidence ed roof fire Cullen released the control at the fourth floor the elevator descended with rapidly increasing force until it hit the bottom of the shaft. One of plaintiff's witnesses testified that it as ti the bottom with "a terrille crash." Another testified that it was like "hitting up against a cement well," "a very hard blow," that "jarred" the witness. Another testified that when it hit the bottom redtona ". rooft end daugret guior erem yent tent ton of bemeet fi rojavele ent ment * * * . bran yrev mojjod ent deurte ew Jant beiliteet Moon has been um bedsug bed anistemes shil flot test ti mottod ent tid down to my feet. " One of plaintiff's witnesses testified that as the elevator olal form forpor all bedraver "selfor emissions are topicola and it had no effect. It increased in momentum at the same time. * * * The centrol secret to sidil a little bit, as he moved it into reverse, and them los moved it bear into high, and as he would it lead in reverse out the late and of the set of the contract "stance" to be and the later to be and reseal and termed gain Just Just the end has an account day, the end" and factor until we landed. " Amorber without for plaintiff twellfield all has remained the third floor down and a second of the second of the facts becline and fant tradevels and gade or being maller has no you or event the control lever on the elevator, and as just continued. The elevator man moved the lever horizontally, . . . The elevator just continued to of erene wool's brids edt is saw II * * * qois son bib il; no coro

tried to operate the elevator. The elevator just made a shuddering motion and continued to lower;" that the speed increased on the way down until it stopped at the bottom. Cullen, testifying for defendant, stated that plaintiff and her party got on the elevator at the fifth floor: that as the elevator left the fifth floor it started up gradually and increased its speed a certain amount; that it could be stopped in three or four feet; that he did not touch the control lever until the elevator was three or four feet above the lobby floor and that the elevator could be stopped at that floor in that distance; that when he broke the contact the car slackened somewhat and the brakes held; that the power was not off entirely until the car went into the basement; that when the elevator got to the bottom "the car stopped on the bumpers. There was a very slight jar and I attempted to raise the car again and found that my support was broken and I couldn't raise the car and so I opened my doors and let the passengers out. * * * I went around to get the car in operation, with the engineer;" that he came down and assisted by "the other bell boy" they moved "the cable back over onto the groove in the drum. * * * le had a rod there to pry the cable back over into that groove and the circuit had to be made at that time;" that the engineer held in the circuit breaker "and I was in the car at the throttle at the lever there;" that when the cable was forced back in the groove the car started up again; that it took "about five or ten minutes, not much longer," to restore the service. The following question was put to the witness: "Q. On this particular occasion, when you pulled this lever over did it break the contact? A. Well, it must have, because I could not operate the car. * * * I suppose the brake did not hold exactly tight enough to stop the car." The witness further testified that the governor regulates the safety dogs; that he understood He further testified: how this was done "to a certain extent." "I imagine it is a mechanical brake on there and when you throw your power off the brake holds. That's all I can figure out. That is when I pull the lever to the center. The contact with the motor, that runs the motor, should have broken, and when that breaks it cuts off the

tried to operate the elevator. The elevator fust made a shuddering www end no because to lever; " that the speed increased to way down until it stopped at the bottom. Cullen, testifying for defendant, stated that plaintiff and her party got on the elevator at the fifth Cloor: that as the elevator left the fifth floor it started up gradually mi begget and the special amount: the the bear at bears and has ent figur tower Loringo one though for his en this ties and to so with ent tait has roof yddol ent evods teet roof o sent taw rotsvels od genw fait sometelb fadt at reell fadt de begante ed blues retavele fant this contact the converse benedicted the belt totaled and sine mese desired the car went in the car went into the basement; edd no bequote use eith mettod edt of for ustavele edd nedd talt bumpers. There was a very slight far and I attempted to raise the car odf ceiri t'ablece I bae aederd esw froque we failt base t bae alege car and so I opened my doors and let the passengers out. * * I went eman of tail a granisme with the engineer; a the ent tog of bounce down and assisted by "the other bell boy" they moved "the cable back or onto the groove in the drum. * * " "e had a rod there to pry the tant ta eban ed of bad fiveric end has every that to be made aldes on't mi asw I bas" redaerd fiveric ent at Sled recurrence ent fadt ":emij best tine throttle at the level "here;" that what the cable was forced back in the groove the car started up again; that it took "about five or ten minutes, not much longer." to restore the service. The following questions was put to the editors: "Q. On this perticular consultur, water mirror I reach a reach a manual transport of the property of tion not bout expends than enough to show the care. On diame for man boutsmiss of this tajos giving our accelence convers ou soil belifted how this was done "to a certain extent." . in the cot end and and aids wol " income and and make the said to said formation at if ordinal I" can tigure out. That's all I can figure out. That is when mild the lever to the center. The contest with the colon, took rink the meter, should have become and size that breaks it out off too

motor and puts this brake into operation. It did on this particular occasion. The brake held. That's what slowed the car down. That's what allowed your car to settle. The motor kept on going because there was no power on the motor. As I said before, there is a mechanical brake on there that will hold when the motor is shut off. When the contact isn't broken the brake doesn't hold and the car keeps on going. On this particular occasion it must have broken the contact because I couldn't operate the car. The car did not stop. I suppose the brake did not hold tight enough to stop the car. It did not hold tight enough to stop the car to a dead stop. The power was off the motor when I threw the switch off. The brake held to a certain extent. It allowed the car to drift, to settle. That is not a bad drift. The car just settled slowly. " Cullen, also testified that the elevator. besides being equipped with the regular control lever, was equipped with a baby switch, and that when that switch was pulled it would cut the line, cut off the power, and set the brake; that when he started work at the hotel the engineer of the hotel told him how to operate the car and how to operate the baby switch; that when the engineer used the baby switch it stopped the car; that said switch is located right under the main control, but that he did not work the baby switch at the time of the accident because he knew that if he used it it would throw the power completely off and the elevator "would probably be stuck between the floors and have to get an engineer" to put the elevator in service again. After carefully considering all of the evidence bearing upon the accident we have reached the conclusion that the jury would be fully justified in finding from the evidence want of care in the management of the elevator by the operator, that the elevator was out of repair, and that both of said causes contributed to bring about the accident. In our judgment no honest, intelligent jury could have found a verdict in favor of defendants under the facts and circumstances in evidence.

Defendants contend that the court erred in giving to the jury

motor and puts this brake into operation. It did on this perticular occasion, The brake held. That's what slowed the car down. what allowed your car to settle. The motor kept on going because As I said before, there is a mechanical there was no power on the motor. brake on there that will hold when the motor is shut off. contact isn't broken the brake doesn't hold and the car keeps on going, I make and Joseph and assess over Jam II not took taleours atter at The car did not stop. I suppose the brake THE REST WENT TO THE THE PARTY OF ALD NOT DEAD TERMS CO SING MISS CAP TO THE CAP, IT HE WAS NOT BEEN The power was off the motor enough to stop the car to a dead stop. tI .insign exists and all of the interest of the contract of t off .firb bad a ton at that . eltte to the drift, bewolle car just settled slowly." Cullen, also testified that the clevator, besides being equipped with the regular control lever, was equipped with a beby switch, and that when that switch was pulled it would out the line, cut for the power, and set the crake; that when he started worlf at the hotel the engineer of the hotel told had now to operate the car and how to operate the baby switch; that when the engineer used the booy switch it stopped the car: that said switch is located right under emit old ta dittal gabe the did not work the baby switch at the time at suit wormit bluow it it beck sa it tent were an excessed insbloom sait lo power completely off and the elevator "would probably be stuck between the floors and have to get an engineer" to put the elevator in service again. After carefully considering all of the evidence bearing upon the accident we have reached the conclusion that the jury would be fully justified in finding from the evidence want of care in the management of the elevator by the operator, that the elevator was out of ed thet both of said causes contributed to bring about the secident, in our juarent so homer, lessificant jury could have found ai zeonstamporio bus ajosi eli rebu ajuntantendente de rever di jeibrev a

Defendants contend that the court erred in giving to the full

plaintiff's instruction number o, which reads: "(6) The court instructs the jury that if you believe from the evidence in this case. that the plaintiff on or about the 3rd day of May, 1936, was rightfully in an elevator in the possession of and operated by the defendants and situated in the Alexandria Motel, for the purpose of being carried thereby from one of the upper floors of said building to the ground floor thereof; and if you further believe from the evidence that while the plaintiff was so in such elevator, and in the exercise of reasonable and ordinary care for her own safety, said elevator fell in the shaft of said elevator and violently struck against the bottom of said shaft; and if you further believe from the evidence that the plaintiff was thereby injured as charged in the complaint, then the burden would be upon the defendants to prove by the evidence, that the defendants could not have prevented said accident by the exercise of the highest degree of care, consistent with the practical prosecution of their business and the mode of conveyance adopted." (Italics ours.) Defendants complain of that part of the instruction that we have italicized. We find no merit in the contention.

In Elgin, Aurora & Southern Traction Co. v. Milson, 217 III.

47, the court said (pp. 51, 52): "The appellant company is a common carrier of passengers for hire. The appelles became a passenger on one of its cars. The rule of liability is that applicable to the relation of carrier and passenger. Proof that the appellee was a passenger, that the car in which she was riding collided with another car and that she was injured, no negligence appearing on her part, made a prima facie case of negligent failure on the part of the appellant to discharge the duty it owed to her, and entitled her to recover damages for the injuries sustained by her unless the appellant company, by proof, should acquit itself of the presumption that the collision was in some way occasioned by its failure to discharge its duty as a public carrier to the appellee, as its passenger. [Citing cases.] * * * The doctrine to be deduced from the above cases is,

plaintiff's instruction number 6, which reads: "(6) The court instructs, the jury that if you believe from the svidence in this case, that the plaintiff on or about the 3rd day of May, 1936, was rightfully but administration of the possession of an approximate and the contents as the estuated in the Alexandria Motel, for the purpose of being carried thereby from one of the upper floors of said bullding to the ground floor thereof; and if you further believe from the evidence that while the plaintiff was so in such elevator, and in the exercise of reasonable Their out at List torsvels biss trained and to terror training bas thad bise to motiod sat tenings wants yltusiety bas retevele bise to The Tribulate and your summittee the most evaluate their two in of blace moreout are out . This person will be be all this year. bluck affile from the first track for every or affective and for the second James in add to as busin will be implied in a jump your way tending time to millioners Indiang and the Architect come to and the and of names adopted. (Lighton pairs.) Defindants complain of that part of the instruction that we have italicaed. find no merit in the contention.

In Elgin, Aurors & continued and and a continued and a continued and a contribution of passengers for hire. The appelles became a passenger on relation of carrier and passenger. Proof that the appelles was a passenger, that the car in which she was riding collided with another car and that she was injured, no negligence appearing on her part, made a primar facile case of negligent fajlure on the part of the appellant to discharge the duty it owed to her, and entitled her to recover damages for the injuries sustained by her unless the injuries for the injuries sustained by her unless the injuries for the injuries sustained by her unless the distinction of the injuries and continued the in

that when one becomes a passenger on a car of a common carrier to be transported from one station on its line to another, and has paid a consideration therefor, the contract on the part of the carrier is to provide safe and sound cars, track and necessary appliances to carry the passenger to his or her destination without injury. Where such a passenger is injured by a collision, proof of the relation of passenger and carrier, of the collision and the injury, if no contributing negligence on the part of the passenger appears, makes a prima facie case for the resulting damages, and casts upon the common carrier the onus of proving that the injury resulted from inevitable accident or from some cause against which human prudence and foresight could not have provided. (Italics ours.) See, also, Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 331, 332, where an instruction like the instant one was approved. In Styburski v. hiverview Park Co., 298 Ill. App. 1 (decided by this division of the court), Mr. Justice Sullivan cites numerous cases bearing upon the doctrine of res ipsa loguitur, and holds that in an action by a patron of an aerial ride at an amusement park for injuries sustained when a cable broke, where there was no intimation that the plaintiff was at fault, and a prima facie case of negligence having been established by the facts of the occurrence and the injury to plaintiff, under the doctrine of res ipsa loquitur, the burden of proof was upon defendant to show that the accident was without its fault, and that the question whether the prima facie case of negligence was overcome by defendant's evidence was one of fact for the jury. A petition for leave to appeal from our judgment was denied by the Supreme court (ib. xvi).

In support of their contention that the italicized portion of the instruction was erroneous defendants cite, as "the leading case in this State," Bollenbach v. Bloomenthal, 341 III. 539.

That case has no bearing upon the instant contention. There, plaintiff sued defendants, dentists, for alleged malpractice. The plaintiff tried the case upon the theory that the doctrine of res ipsa loquitur applied in such a case. The court said (pp. 542 & 546):

that when one becomes a passenger on a car of a cornen carrier to be transported from one station on its line to another, and hes paid a es at reign the carrier on the part to the carrier the provide safe and sound cars, track and necessary appliances to carry the passenger to his or her destination without injury. Where such a passenger is injured by a collision, proof of the relation passenger and cerrier, of the collision and the injury, if no contributing negligence on the part of the passenger appears, makes a prima South care for the real that have a mile a set thank the form of during on Junitary and is you and believe to talk a board mixem in auto and After multi-not an employer pero data. Jentoca same area and sa not have mrowledge. (I califor cours.) . ou. wine, then a city of v. herroll, for Ill. 10, 13, 150; there as independent the Mar BO ... wit wit yet a become at the world a see August Its. app. 1 (decided by bhis division of the cents), in, during Sullivan cites numerous cases bearing upon the doctrine of res tage local tur, and holds that in an action by a pairon of an certal ride at an anusement park for injuries sustained when a cable broke, where there was no intimation that the plaintiff was at fault, and a prima facie case of negligence having been established by the facts of the occurrence and the injury to plaintiff, under the doctrine of res inst work of inshered nogu saw loon of nebrud out , nutiunol sagi realists retired was without tas fault, and that the cuestion which the prima facte case of negligence was overcome by defendant's evidence was one of fact for the jury. A petition for leave to appeal from our judgment was denied by the Supreme court (ib. xvi).

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If the back as a second of the court said (pp. 542 & 545):

"The case proceeded to trial on the theory that the facts were sufficient to invoke the doctrine of res ipsa lo uitur, and in affirming the judgment the appellate Court has sustained the application of that doctrine. Defendants seriously contend that the doctrine of res ipsa locuitur is not applicable in this case, and our decision will rest upon the determination of this one question. * * * No case has been cited where the doctrine of res ipsa loquitur has been applied by this court as an aid to recovery in a malpractice suit," and the court held that the trial court erred in giving an instruction directing the application of the doctrine of res ipsa loquitur and in allowing plaintiff's attorney to argue it before the jury. Defendants also cite Barnes v. Danville Street Ry. Co., 235 Ill. 566, and call attention to the fact that the following instruction was there held to be erroneous (p. 572): "The court instructs the jury that the happening of an accident to the car and proof that an injury to a passenger resulted therefrom during the course of his transportation, and proof that at the time of the accident, and just prior thereto. the passenger was himself in the exercise of due care and caution for his own safety, raises a presumption that the carrier has been negligent. The burden of rebutting this presumption rests upon the carrier. "" In the Barnes case the injury to the passenger was caused by a collision between a street car belonging to the defendant, in which the plaintiff, a passenger, was riding, and the locomotive of a steam railroad owned and operated by a different company. Under the facts of that case the instruction passed upon by the Supreme court was clearly erroneous. The Barnes case, under its facts, does not apply to the instant case.

Defendants contend that "the damage awarded by the jury is excessive and manifestly is the result of passion, prejudice or misconception." In this connection defendants contend that counsel for plaintiff was guilty of conduct that tended to create prejudice and passion in the minds of the jury and caused them to bring in a highly excessive verdict. Plaintiff's witness Dr. Scheele, who was her

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family physician and attended her before and after the accident in question, testified that he had signed a certain document shown him by cefendants' counsel. He was then cross-examined at length in reference to the statements made in the document. When the cross-examination of the doctor was concluded the following occurred: "Ar. Spencer [attorney for plaintiff]: You may offer it now and I won't object to it. Mr. Farrell [attorney for defendants]: No, I will proceed in an orderly fashion and put it in evidence. Mr. Spencer: Lill you put in the rest of this that you tore off before you handed it to the witness? Mr. Farrell: I object to the comment there. Mr. Spencer: Something that occurred in the presence of the jury. Mr. Farrell: Just a minute. I object to the comment and ask the jury to be instructed to disregard it. The Court: That statement that somebody tore something off. nothing in that. Mr. Spencer: It occurred right in the presence of the jury. Mr. Farrell: I object to that. Mr. Spencer: The court asked me if anything occurred. Mr. Burkhalter [attorney for defendants]: You are an experienced lawyer and should not do that. Mr. Spencer: You say that is not the truth? Ir. Burkhalter: You are too experienced to try to do that before the jury. The Court: That has not been offered in evidence. Mr. Spencer: All right. Mr. Burkhalter: It is unbecoming to you. Mr. Spencer: I am not asking counsel to approve my conduct, your Honor." The original document is incorporated in the record and it shows that the top part of the document has been torn off. What that part contained the record does not show. Mr. Spencer stated that counsel for defendants tore off a part of the document in the presence of the jury. It will be noted that the counsel for defendants did not deny that such was the fact, but proceeded to lecture Mr. Spencer and to accuse him of unbecoming conduct. If counsel for defendants did not tear off part of the document in the presence of the jury the statement of Mr. Spencer would injure plaintiff instead of defendants. The reasonable conclusion to be

Cally physician and actorded has belowe and after the addition in question, testified that he had signed a certain decument shown him by defendants' scansel. As wer blem prost-examined of length in referwhen to the statements made in the document, when the areas-errainactor of the doctor was concluded the following occurred: "Mr. Spencer of Footdo P'mow T has you at to lie you set if 19.1 ratal g not terrorie] it. Mr. Farrell [attorney for defendants]: No, I will proceed in an orderly fashion and put it in evidence, Mr. Spencer: Will you rul in Variously oid as it belong may equiled The end may fails alid to fave and Mr. Farrell: I object to the comment there. Mr. Spencer: Something that occurred in the presence of the jury. Mr. Parrell: Just a clouts. I object to the comment and eak the lary to be instructed to and the complete that statement that somebody tore something off, nothing in that, Mr. Spencer: It occurred right in the measure of the jury. Mr. Narella I object to that. Mr. Spensers the court asked so if anything congrest, it, Burkhalter (allerney for defendental: You are an experienced lawyer and should not do that. Spencer: You say that is not the truth? Mr. Burkhalter: You are too experienced to try to do that before the jury. The Courts That has net been effered in evidence. Er, speneer: All right. Er, Boricelter: It is unbescuing to yea, Mr. Spencer: I am he's asiding councel to approve my conduct, your imnor. The original dorwest is incurpossible in the record and it allows that the top part of the decument has been the work you and broads and the record does not show. It's add to drag a tto sand almahantah wet frames dadd tedala recessed di this presence of the fl. . It will be present all the flammed counsel for defendants did not deny that such was the fact, but proanded to locture is, ipensor and to south his of unbeacating equities. at Januard and to Just Tie that Jon bib simebrated not fearness if the steemes of the just the stebenut of er, Spancer would injure plaintiff instead of defendants, The Neuronaids consistion to be drawn from the record is that the upper part of the document was torn off by defendants' counsel in the presence of the jury. If there was nothing material upon the part torn off, counsel for defendants could have ended the matter, to the advantage of defendants, by offering to attach to the document the part torn off, when they introduced it. They did not see fit to follow such a procedure.

here the damages assessed by the jury excessive, as defendants contend? Evidence for plaintiff tends to prove the following facts: Plaintiff, prior to the accident, had a small umbilical hernia. described as the size of the end of her thumb, or the size of a small Wisconsin hickory nut. This condition had existed since 1931. Between 19:1 and the time of the accident the hernia had not increased in size. it did not cause plaintiff any pain or suffering, and she was not in any way disabled by it. Sometime after the accident the hernia became aggravated and enlarged and in September, 1936, it was three inches in dismeter, and, still later, the size of an orange. Physicians testifying for plaintiff testified that an operation would ordinarily remedy such a condition but that plaintiff was a diabetic and an operation would not be advisable unless the hernia became strangulated. They further testified that if the hernia continued to get larger it could not be held in place. During the two years between the accident and the trial plaintiff suffered great pain. While an abdominal support gives her a measure of relief, as soon as the support is taken off the hernia begins to protrude and has to be pushed back into place before the support can be placed in position. Prior to the accident plaintiff was in good health, save for the diabetes, and was able to do the housework for a family of four. Since the accident she 1s unable to do any but certain light household duties. Defendants contend that the accident did not cause any aggravation of the hernia, and that "the medical evidence" clearly establishes that the hernia as it now exists was not caused by the accident. We think the jury were justified in finding from the evidence that the accident caused the aggravation. Plaintiff's son testified that when the elevator

drawn from the record is that the upper part of the document was term off by defendants' counsel in the presence of the jury. If the could have ended the actter, to the advantage of defendants, by offering to attach to the document the part term off, when they introduced it. They did not see fit to follow such a procedure.

were the damages assessed by the jury excessive, as defendants contend? Evidence for plaintil tends to prove the following facts: Plaintiff, prior to the accident, had a small umbilted hernias lisms a to sake sait to demait ted to bus sait to sake out as beditosed Visconsin highery aut. This condition had existed since 1911. Between 1931 and the time of the accident the hernia had not increased in suc. at for east one cause the say pairs to all the thing seaso for bid it eny way disabled by it. Sometime after the accident the hernia became or vated and onlarged and in September, 1936, it was three inches in dismeter, and, still leter, the size of an orange, Physicians testifying for plaintiff weetfiel that an operation would orthorily remay meijerego ne bna eligabe a esw l'ilitate plat tud noilita en a sucception would not be advisable unless the hernia became strangulated. bises it regral top of besintings abruad out it test belilitest restruit not be hold in place. During the two years between the accident and the tried plaintiff and love pele, with an audomina support The modeure of relief, as seen as the support of the nervice begins to pretrain and has to be pished both into place wefore the support can be placed in position. Frior to the sucident of olds sew has acceptable out to ever although one as Thinish do the housework for a family of four. Since the accident she is unable to do any but certain light household duties. Defendants continu that the anthone oil to not everynge one many and the norther and fault "the medical oridence" clearly establishes that the hernia as it most exists was not caused by the accident. We think the jury were justise ed begues inchicas on; jadi comebive ent mori anibati al ball Plaintiff's son testified that when the elevator aggravation.

struck the basement his mother went to her knees, grabbed her side, screamed, "Oh, my God," and collapsed. Frank Bucci testified that after the elevator struck plaintiff was in a limp position on the floor of the elevator and that she screamed, "Oh, my stomach;" that she was semi-conscious as she was assisted out of the elevator. Mary Memulty testified that when the elevator struck the bottom her mother, as she fell, grabbed her abdomen and cried, "Oh, dad, my God." Plaintiff's husband testified that after the elevator struck the bottom plaintiff slumped completely down and that as he and Bucci took her out of the elevator she appeared to be unconscious. Plaintiff testified. "Just as we struck the bottom I had a terrific pain in my stomach; it felt to me as though something had torn in me." After plaintiff had reached her home in Waukesha Dr. Scheele examined her. She was then lying in bed on her back, and complained of her right shoulder, her back, and the hernia. He examined her right shoulder and found that it was tender and that there was a limitation of motion of the shoulder, and he "strapped her back up." He further testified that the hernia was practically the same size as it was previously; that plaintiff complained some about it, but upon his examination he could not find very much wrong. About a week after the accident he thought the hernia was larger and strapped it with adhesive tape to hold it in. After that time he saw plaintiff at intervals and made examinations of the hernia from time to time, but he could not see very much difference in the size during the year after the accident. Several times he renewed the adhesive tape to strap up the hernia. About six weeks after the accident he told her to have a belt made and to put it on every day to give support to hold the hernia in. He further testified that in March, 1938, the hernia had increased to the size of a "decent sized orange." Blanche Wilson testified that she fitted plaintiff to an abdominal support in September, 1936; that she found that plaintiff had an umbilical hernia about three inches in diameter. Dr. Adams examined plaintiff on March 9, 1937.

struck the basement his mother went to her knoes, grabbed her side, sereamed, "Oh, my God," and collapsed. Frank Buccl testified that after the elevator struck plaintiff was in a limp position on the floor of the elevator and that shearreamed, "Oh, my stommeh: "that was semi-conscious as she was assisted out of the clerator. Wast Medualty testified that when the elevator struck the bottom her mother. as she fell, grabbed her abdomen and cried, "Ch, dad, my God," Plainmotted and habits interests and golfa half healthand handhin attill plaintiff slumped completely down and that as he and bucci took her out of the elevator she appeared to be unconscious, Plaintiff testified, "Just as we struck the bottom I had a terrific pain in my stongeh; it felt to me as though something had tern in me. " After plaintiff had reached her home in Waukenha Dr. Ccheele excained her. She was then lying in bed on her back, and complained of her right shoulder, her back, and the hernia. He examined her right shoulder molios lo molistimil a caw ered that the rebest asw it tait become of the shoulder, and he "strupped her back up." He further testified Unt I was practically the same size as it was previously; of mail subsects the mage and all decode were beningane Tribulate and andld not find very made where About a west often the notions in of equi evisence with a strapped it with adhesive tape to abau has alavrethit as Thinnisla was on smit tant retta , at it blod examinations of the harmia from time to time, but he could not see very much difference in the size during the year after the accident. Several times he renewed the adhesive tape to strap up the hornia. About six weeks after the accident he told her to have a belt made and to put it on every day to give support to hold the hernia in. He Tarther tentified bast in three, 1976, the merits had instruced to jadi beliliteet noeliw edonald ".ogasto beaks incools a To exis edi to it is a plainful to an about a property in appropriate the state and what though alarma Lightlener as but titlately food bears wile sads inches in diameter. Dr. Adems examined plaintiff on Merch 9, 1937.

He testified that when plaintiff was lying on the table there was an opening beginning at the navel and extending down along the line in the middle of the belly, so that four fingers could be placed in the opening; that when she was standing erect a mass would gradually come through the opening which attained the size of the doctor's fist; that plaintiff was suffering from a rupture; that when he re-examined her on May 9, 1938, he found the protrusion had increased somewhat in size. He also testified, in response to a hypothetical question based upon plaintiff's evidence, that the accident was, "with reasonable medical certainty, a sufficient cause to bring about and cause the increased size of the hernia." Both Dr. Scheele and Dr. Adams testified that an operation would remedy plaintiff's hernia if she were not a diabetic; that that condition would greatly increase the hazard of an operation to repair the hernia. Defendants' major argument is that the medical testimony supports their position that the fact that there was no immediate increase in the size of the rupture, as evidenced by the examination of Dr. Scheele, shows conclusively that no relationship existed between the subsequent increase in the size of the hernia and the accident. Dr. itchell was the only expert called by defendants. Mis testimony, at first blush, seems to support defendants' argument. But the answer of the doctor, upon which defendants rely, was in response to a hypothetical question based upon testimony most favorable to defendants. The question disregarded entirely the evidence introduced by plaintiff as to the great force with which the elevator struck the basement floor and the immediate effects that the shock had upon her. The doctor's answer is based upon the assumption that plaintiff received no shock and did not collapse at the time of the accident. Indeed, the question was so artfully drafted that the doctor testified that the accident described in the suestion could not have caused an aggravation of the preexisting hernia. The jury were justified in giving but little weight to such testimony.

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The evidence for plaintiff shows that when Dr. .cheele first examined the patient she was in bed, lying upon her back, and in such a position the hernia would not protrude very greatly at that time although the hernia internally may have been aggravated. As Dr. Scheele stated. "You would have to rupture the tissues there. It would take a certain time for the bowels and food inside to come through and form the hernia." Dr. Adams testified that it would be quite illogical to infer that the accident did not aggravate plaintiff's hernia because Dr. Scheele on the day after the occurrence found the hernia the same size as he had found it a year before. Nost laymen are fairly familiar with hernias, and the jury would have been warranted, in view of all the evidence, in finding that the accident did aggravate the hernia, especially in view of the overwhelming evidence that when the elevator struck the bottom plaintiff held her abdomen and cried. "Oh. my stomach." Plaintiff testified, "Just as we struck the bottom I had a terrific pain in my stomach; it felt to me as though something had torn in me."

flaintiff will have an umbilical hernia the size of a man's fist the rest of her life. Should strangulation of the hernia occur, such a condition would force her physician to take the great risk of an operation in an effort to save her life. While the abdominal support gives her relief, as soon as the support is taken off the hernia begins to protrude, and it has to be pushed back into place before the support can be again placed in position. We have carefully considered the question as to whether the damages awarded are excessive and we are unable to say that the amount awarded is excessive.

Defendants contend that they were prejudiced by a remark make by the attorney for plaintiff in his closing argument. During the closing argument of counsel for plaintiff the following occurred: "As big as a fist, Doctor Adams says - a man who is put up here in this community as an expert - counsel says for forty-two years - is that right? - 1896 - a man of the highest appearance - you saw him - couldn't be better. He tells you that there is a mass now as big as his fist; when this lady

the college of the property of the when in. (alocal first examined the patient she was in bed, lying upon her back, and in such a position ent approates emit tant to yethern your shurtery for bluow stared ent hernia internally may have been aggravated. As Dr. Colocole stated. "You would have to rupture the tissues there. It would take a certain time for the bowels and food inside to come through and form the hermis." Dr. Adems testified that it would be quite illogical to seassed sinted at Thirmisiq edaystyps for hib inchiose salt fault telmi Dr. Schoele on the day after the occurrence found the herniz the seas size as he had found it a year before. Most layuen are fairly familiar Ils to water, and the jury would have been warranted, in view of all the evidence, in finding that the accident did aggravate the hounis, especially in view of the overwhelming evidence that when the elevator struck the bottom plaintiff held her abdomen and cried, "Oh, my stemach." Plaintiff testified, "Just as we struck the bottom I had a bed anidomes a body as em of the this assence an ala gentlement "orn in me."

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stands up without her surgical belt on, that it protruces out like that. What would you take to have that thing fastened on you? Mr. Farrell: I object to that as improper. The Court: I think any reference - Mr. Farrell: The jury has seen the doctor. The Court: Sustained." Defendants now complain of the remark, "What would you take to have that thing fastened on you?" It will be noticed that counsel for defendants cut short the court's comment on the objection, and that the counsel at the time appeared to be objecting to counsel for plaintiff's praise of Dr. Adams. Defendants' counsel seemed to be satisfied with the court's ruling and made no request that the jury should be instructed to disregard anything that plaintiff's counsel had stated. It further appears that in defendents' motion for a new trial no point was made as to the language now complained of, viz., "That would you take to have that thing fastened on you!" Counsel for plaintiff contends that defendants' counsel are in no position to complain of anything that he said during the trial, as they themselves were guilty of improper conduct upon a number of occasions during the proceedings. The record shows that there is merit in this contention of plaintiff's counsel. In any event, we find no force in defendant's contention, raised here for the first time, that the remark in question was sufficient in itself to warrant a reversal of the judgment.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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The judgment of the Superior court of Gook county is affirmed.

Sullivan, P. J., and Wriend, J., concur.

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G. S. ELLITHORPE,
Appellant.

V.

GLENN E. HOLMES, Appellee. APPEAL FROM CIRCUIT COURT,

305 I.A. 625²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued in contract to recover for brokerage commissions. Defendant filed a written motion to strike the amended complaint and dismiss the cause upon the ground, inter alia, that the alleged cause of action was barred by the five-year statute of limitations. The trial court sustained the motion and dismissed the suit. Plaintiff appeals.

The amended complaint alleges that prior to March 12, 1937, defendant employed plaintiff, a licensed real estate broker, as exclusive real estate broker to negotiate for the sale, sublease, transfer, or other disposition of the interest of defendant in certain described real property located in Chicago; "that thereupon and thereafter the said defendant * * confirmed in writing the said employment, in words and figures as follows:

"March 12th, 1927

"Mr. G. S. Ellithorpe, "137 Merrill Avenue, "Park Ridge, Illinois.

"Dear Sir:

"This will confirm our verbal understanding that you are to act as exclusive broker for my interests in the property located at numbers 22 to 36 west Lake Street, this city, and I hereby authorize you to negotiate for the sale, sub-lease, transfer or other disposition of same, it being understood that all terms or conditions of any negotiations are to be subject to my agreement in writing.

"Yours very truly,

"(signed) Glenn E. Holmes"

The complaint further alleges that pursuant to the said employment

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Plaintiff sued in centract to recover for brokerage coumisations.

Defendent filed a written motion to strike the amended complaint and

distance to the five-year statute of limitations. The

trial court sustained the motion and dismissed the suit. Plaintiff

The amended complaint alleges that prior to Morch 12, 1937, defendant exployed definition and the sale for the sale, sublease, transfer, or other deposition of the incomment of the sale defendant * * * confirmed in writing the said employment, in words and figures as follows:

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"This will confirm our verbal understanding that you are to act t

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The complaint further alleges that pursuant to the said employment

plaintiff negotiated for the disposition of defendant's interest in the property and that as a result of his services as such broker a contract of sale was entered into on Movember 26, 1927, between defendant and certain transferees, etc., of said interest, and thereafter on December 27, 1927, the transaction between the said parties was consummated. The complaint then sets up that the consideration for the transfer of the property was 208 shares of stock of the Dearborn-Lake Building Corporation, which was then and there of the market value of \$250,000; that "the usual reasonable and customary brokerage commissions for the services performed by plaintiff aforesaid, on and about the months of Movember and December, 1927, was 35 computed on the basis of the value of the consideration of such sale, transfer and assignment as aforesaid, of \$250,000, or \$7,500 commission."

Plaintiff contends that "the writing sued upon is a written contract and that the five-year statute of limitations has no application," and that the ten-year statute of limitations applies. Defendant contends: "1. The obligation of the defendant on which recovery is sought is an implied promise to pay plaintiff the reasonable value of his services, hence an oral contract within the statute of limitations and barred by the lapse of five years. 2. The letter recited in the amended complaint is merely evidence of the employment of plaintiff by defendant but does not constitute a written contract between them within the meaning of the statute of limitations as distinguished from a written memorandum under the statute of frauds. The cause of action on which recovery is sought is based on the employment plus performance by the defendant which, by operation of law, entitles plaintiff to an action for commissions. The letter is of evidentiary value should defendant deny the employment, but the gravamen of the action is the implied obligation."

The original complaint was filed November 23, 1937. Plaintiff's cause of action as alleged in the amended complaint arose November 26, 1927. It seems plain to us that under the settled rule of law in this

plaintiff negotiated for the disposition of defendant's interest in the property and that as a result of his services as such broker a contract of sale was entered into an Hovenber 26, 1927, between defendant and certain transferees, etc., of said interest, and thereafter on December 27, 1927, the transaction between the said parties consummated. The complaint then sets up that the consideration for the transfer of the property was 208 shares of stock of the earborn-Lake Duilding Corporation, which was then and there of the market value of \$250,000; that "the asual reasonable and customary brokerage commissions for the services parformed by plaintiff eforesaid, on and about the months of Lovenber and December, 1927, was 31 computed on the basis of the value of the consideration of such sale, transfer and assignment as aforesaid, of \$250,000, or \$7,500 concission."

Plaintiff contends that "the writing sued upon is a written -iligs on and that indifferent statute to end to an indifferent and the contract of the contra estion," and that the ten-year statute of limitations applies. Defendant contends: "I. The obligation of the defendant on which -nocest oil Tlifately yes of school beilgmi as at farce of yrovest efutata eft midt w teartage an ere are contract in the exist elds of limitations and barred by the lapse of five years. 2. The letter Inamyoloms out to complive victor at Julalomoo behaves out at bejiese factines astitus a statifunes for seeb jud jusheseb yd Thijniala lo between them within the meaning of the statute of limitations as distinguished from a settling more on under the statute of frauds, the cause of action on which recovery is sought is based on the employment plus performance by the defendent which, by operation of law, ontitles quality to an extinction for conditions, the letter is of evid clary value should defendent deny the employment, but the gravemen of the ".meijsgildo beilqui edi zi moijos

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State plaintiff's action was upon an implied contract and therefore the five-year statute of limitations applies. The letter set forth in the amended complaint confirms the employment of plaintiff as broker but makes no mention of compensation. Indeed, the amended complaint does not allege any promise by defendant, express or implied, to compensate plaintiff for the latter's services as real estate broker. But where brokers are employed to sell a piece of real estate there is an implied obligation to pay the customary and reasonable compensation for the services performed.

An action upon an implied contract must be brought within five years after the cause of action accrued. (Mowatt v. City of Chicago. 292 Ill. 578.) In that case the court said (p. 582): "In this State it has been held that if the action is brought upon a mere implied undertaking the five year Statute of Limitations controls. (Knight v. St. Louis, Iron Bountain and Southern Railway Co., 141 Ill. 110; Bates v. Bates Machine Co., 230 id. 619.) This court has held that a written contract is one in which all of its terms are in writing; that a contract partly in writing and partly oral is in legal effect an oral contract. If parol evidence must be introduced to sustain the action the contract is not in writing under this statute. (Conductors' Benefit Ass'n v. Loomis, 142 Ill. 560.) The following authorities support same conclusion: 25 Cyc. 1042; 1 wood on Limitations, (4th ed.) sec. 37f, and cases cited; Bishop on Contracts, secs. 197-203, incl.; 3 Page on Law of Contracts, (2d ed.) sec. 1500, and authorities cited; Dodd v. Board of Education, 122 Cal. 106." (See, also, Junker v. Rush, 136 III. 179, 184.)

The letter in the amended complaint is undoubtedly evidence of the transaction between the parties, but to establish his claim plaintiff would be obliged to introduce oral testimony to prove the reasonable and customary commission for services such as plaintiff performed. Defendant would then have the right to introduce oral testimony to rebut that offered by plaintiff. As stated in the Mowatt case (p. 582): "* * a contract partly in writing and partly oral is in legal effect an oral contract. If parol evidence must be introduced to sustain the action

State plaintiff's action was upon an implied contract and therefore the five-year statute of limitations applies. The letter set forth in the amended complaint confirms the employment of plaintiff as broker but makes no mention of compensation. Indeed, the amended complaint does not allege any promise by defendant, empress or implied, to compensate plaintiff for the latter's services as real estate broker. But where brokers are employed to sell a piece of real estate there is an implied obligation to pay the customery and reasonable compensation for the services performed.

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Plaintiff contends that the trial court committed reversible error in denying him the right to amend his amended complaint. It is conceded that the judgment of the trial court was predicated upon the ground that the five-year statute of limitations applied. Plaintiff had already filed an amended complaint. We did not submit to the trial court a second amended complaint and so far as the record shows no showing was made that plaintiff could have avoided the five-year statute by alleging a different cause of action arising out of the transaction in question, nor does plaintiff attempt to show this court how a second amended complaint would have aided his cause. He simply asserts that the action of the trial court wiped out his rights. In view of the record before us, we certainly would not be warranted in holding that the trial court committed reversible error in denying plaintiff's motion for leave to file a second amended complaint.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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The judgment of the Circuit court of Cook county is

ADDRESS OF THE PARTY.

"Livan, P. J., and Priend, J., concur.

PEOPLE ex rel. CHARLES DE LEUW & COMPANY, a Corporation, Plaintiff,

W.

VILLAGE OF MIDLOTHIAN, a Municipal Corporation,

(Defendant) Appellant.

CHARLES DE LEUW & COMPANY, a Corporation, (Relator) Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

305 I.A. 626

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Charles De Leuw & Company, a corporation (relator) filed a suit praying for a writ of mandamus to compel the Village of Midlothian to pay to it the amount of certain judgments in its favor against the village, or to appropriate any surplus in the general fund of the village, after providing for the most economical expenses of the village, to the payment of such judgments; to require the village authorities to levy the maximum amount of tax authorized by law and use any surplus over reasonable expenses in paying such judgments, or that such village authorities adopt an ordinance for a bond issue sufficient to pay the judgments and levy taxes to pay such bonds. After defendant filed an answer the relator filed a motion to strike certain paragraphs of the answer and for a judgment in accordance with the prayer of the petition. The trial court sustained the motion and entered a judgment commanding the village authorities to issue such bonds, to deliver them to petitioner, and to levy taxes for their payment. Defendant appealed directly to the Supreme court (People v. Village of Midlothian, 370 Ill. 223), but that court held that it had no jurisdiction of the appeal, and transferred the cause to this court.

The complaint states (1) that on January 23, 1936, plaintiff (relator) recovered a judgment against defendant, in the Circuit court

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corporation, (m jaun & C. WPANTY, a corporation, (nointee) Appatism.

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305 LA. 626

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Charles De Laur & Company, a corporation (relator) filed a suit praying for a writ of mandamus to compact the Village of att mi ajmemphut miejree le inverse and it of year of maintalbill favor against the village, or to appropriate any surplus in the general fund of the village, of her providing for the mark eventuals. expenses of tallage, to the payent of the payers and to see the heriverities to temperature auximum and type of the sutherities the by law and use any surplus over reasonable expenses in paying such rel somenito ne room e entirorities entito doue rait to etcomenta a bond issue sufficient to pay the judgments and levy taxes to pay such bonds. After defendant filed an answer the relator filed a motion to strike certain paragraphs of the answer and for a judgment The trial court in accordance with the prayer of the petition. egalliv oil guibnammes inemghut a bereine bus notion sai benistaus authorities to issue such bonds, to deliver them to petitioner, uffortib beliegge inchafel . Jerement for texts to leave to the to the farmes court (People v. Villoge of state orders 57 ill. (223), but that court held that it had a louisticion of the and transferred the cause to this search.

The complaint states (1) that on January 23, 1936, plaintiff (relator) recovered a judgment against defendant, in the Circuit Court

-2of Cook county, for the sum of 49,621.55 and for 19.60 costs; (2) that on March 30, 1937, it recovered a judgment against defendant, in the appellate court of Illinois, First District, for \$10 costs; (3) that in October, 1937, it recovered a judgment against defendant for \$10 costs in the Supreme court of the State of Illinois; (4) that no part of said several judgments has been paid and that there remains due and unpaid to relator from defendant on the judgment \$9,621.55 and interest thereon at the rate of five per cent per annum from January 23, 1936. and the amount of the judgments for costs, 939.60; (5) that on May 11, 1937, relator demanded of defendant to pay the judgments recovered in the Circuit and Appellate courts and the demand stated that unless defendant made payment or took the necessary steps to make provision for the payment proceedings for mandamus would be had against defendant for its failure to perform its duty; (6) that on May 10, 1938, relator again demanded of defendant the payment of said judgments and also the judgment entered by the Supreme court, which demand was made in writing and delivered to defendant at a meeting of its president and board of trustees: (7) that relator has the right to be paid the said several judgments by defendant and that it is the duty of defendant to make the necessary appropriation and take the necessary steps and to perform the necessary acts to provide the funds to pay to relator its several judgments, with interest, as aforesaid; (8) that the total assessed valuation of all property in the village for the year 1937 was \$590,889; that the total bonds outstanding and ever issued by the village were provided for by Ordinance No. 135 in the amount of \$11,000; that said ordinance was passed February 13, 1935, and by the ordinance there were levied taxes to pay the bonds and interest in the years 1935 to 1946, inclusive, in the several respective amounts stated, totaling \$15,675; that said bonds, by their terms, mature on November 1 in the years 1938 to 1948, inclusive; that

defendant has in its treasury the sums paid to it from the tax levies for the years 1935, 1936 and 1937, applicable to the payment of the principal of said bonds; that defendant is authorized by law to issue

of Cook (county, for the sum of 89,621. 39 and for 119.50 costs; (2) that on ent il. 1937, it recovered a judgment against defendant, in the Fact [17 jeress 01] vot statestill Jeres , that [17] a room als [Depp. in October, 1937, it recovered a dudament against defendant for all jung on jant (4) ; signifil to state and to june emerged ent at alees or said several judgments has been paid and that there remains due and unpaid to relator from defendant on the judgment 19,621.75 and interest thereon at the rate of five per cent per annua from January 25, 1936, and the amount of the judgments for costs, 439.60; (f) that on May ll. 1937, relation demands to defendant to pay the judgment resevende azefur that betate courts and the domand state of the first unless defendant usde payment or took the necessary steps to make provision thebastel Jenisas bad ed bluow sumebmen to tagailessor themys edt tol refalar, 8681, 01 yall no fact (6) that on May 10, 1938, relator odi ogis bas atmembel blue le facered odi inchesel le bebat judgment entered by the Supreme court, which demand was made in writing to breed but the bisorq att to guiteem a to tusbusted of bereviled bus Leveven biss ent bise ed of their ent sad rotefer tent (?) trustees; endem of inches to to the ent at the tant bas transfer by company but the necessary appropriation and take the necessary stops and to perform Line necessary acts to provide the funds to pay to relator its several because Lator and tadd (8) this erols as deereint diw atnomphut religion of all property in the village for the year 1937 was 2590,000; that the total bonds outstanding and ever theter by the village were provided for by Ordinance No. 135 in the amount of Ill,000; that said ordinance one passed Poprincy 1, 1935, and by tarredui bas abnod out you of caxes belved erow ereis was in the in the years 1935 to 1965, inclusive, in the several respective amounts shound, totaling Mij, 575; the said bonds, by their torons, mature on Movember 1 in the years 1938 to 1948, inclusive; that indeeded has in the transact the come pale to it from the tax levies for the year 1935, 1936 and 1937, applicable to be pegrand of the principal of and you are value at the authorise by less to later

its general obligation bonds in more than a sufficient amount to pay relator its said judgments, interest and costs: that relator is willing to accept the general obligation bonds of defendant, that may be legally issued, duly authorized by proper ordinance, in payment of its said judgments: (9) that a true copy of said judgment entered by the Circuit court of Cook county in favor of relator and against defendant, on January 23, 1936, as the same now appears of record in said court and remaining in full force and effect, is attached to the complaint and marked "Exhibit A;" (10) that attached to the complaint and made a part thereof and marked "Exhibit B," is a copy of the written demand made on defendant. on May 10, 1938, to pay said judgments. The complaint prays for summons and that a peremptory writ of mandamus may be issued directing and compelling the president and board of trustees of defendant, the village clerk and village treasurer forthwith, or as soon as practicable, to pay to relator its said judgments, with interest as aforesaid, or to appropriate such surplus that may romain in the general fund of the village, after providing for the most economical expenses of the village, out of that fund to the payment of principal and interest of relator's said judgments: that the president and board of trustees be required to levy amnually the maximum tax authorized by law on all taxable property within the village for the general fund and any surplus of which, after paying out the reasonable expenses of the village, shall be applied to the payment of interest and principal of relator's judgments, or that said president and board, and defendant's other proper officers, be required to prepare and adopt an ordinance providing for the issuance of its general obligation bonds in sufficient amount to pay relator's said judgments, with interest thereon, and to take the necessary steps and perform the necessary acts to make said bonds, so to be issued pursuant to said mandate, the legal obligations of the village, and, at said time, to levy taxes for the ayment thereof upon all the taxable property within the village sufficient to pay the principal and interest on said

its general obligation bonds in more than a sufficient amount to pay relator its said judgments, interest and costs; that relator is willing to accept the general obligation bonds of defendant, that may be legally to sound, dally enthorized by groups wellmose, in payment of its said judgments; (9) that a true copy of said judgment entered by the Circuit court of Cook county in favor of relator and against defendint, on January 23, 1936, as the same new appears of record in said sough and remaining in full forest and effect, is alleaded to the foliations wit of building and (OI) "is abilital" busines has intelligent and no vgos a ai " a fididxa" bestram has toeredd frag a obam has written demand ande on defendant, on way it, 1938, to not seld judgmanus. The complaint prays for admions and that a persuptory will of sensions may be heared directing and compelling the president and board of trustees of defendant, the village clerk and village treamper for the its er as you as greatlackles we gay to reletar its sold judgments, with interest as aforesaid, or to appropriate such surplus that may remain in the general fund of the village, efter To Juo and ing the most economical expenses of the village, out of blue l'und to the payment of principal and lactoria of relation to judgments; that the president and board of trustees be required to endered lie on was yet beginned tax mucham and the mentage of To sulgrue you book how? Isrames out rol egalliv cot midtiw ytregorg which, after paying out the reasonable expenses of the village, shall a rotales to lagioning has treated to thempa ent of beilggs ed ments, or that said prosident and board, and defendant's other proper officers, be required to prepare and adopt an ordinance providing for the issuance of its general obligation bonds in sufficiana acont co yay relator's a in judgments, with interest. District end to take the necessary steps and perform the necessary acts to make said bonds, so to be issued pursuant to said mandate, the legal obligations of the village, and, at said time, to levy Alou to Tital to a side and all the most live with farmer and to be out of the village sufficient to pay the principal and interest on said

bonds at their maturity, and that relator may have such further order in the premises as justice may require.

The answer of defendant (1) admits the allegations contained in paragraphs 1 to 6, inclusive, of relator's petition; (2) as to the allegations contained in paragraph 7 defendant, by reason of the circumstances existing at the present time in defendant village, denies that it has the duty of making any appropriation to pay the judgments of relator; (3) admits the allegations contained in paragraph 8 except that defendant denies that it is authorized to issue its general obligation bonds in more than an amount sufficient to pay relator its said judgments; states that its present debts and obligations exceed the constitutional limits as to debts; (4) states that pursuant to an Act to provide for the incorporation of cities and villages, approved April 10, 1872, as amended, defendant may levy, for general corporate purposes, taxes not to exceed the rate of 2/3 of 1% upon the aggregate valuation of all property within defendant village as the same was equalized for state and county taxes for the current year; that the assessed valuation of all property in defendant village for the year 1937 is the sum of \$590,889; that 2/3 of 1% of said assessed valuation is the sum of \$3,939.26, and said latter sum is the total amount defendant may levy for general corporate purposes; that the necessary, reasonable and economical expenditures of defendant village exceed said sum of \$3,939.26; that the revenues obtainable by defendant from sources other than the said tax levy, together with the taxes obtainable from said tax levy, have been and will be insufficient to pay the necessary, reasonable and most economical corporate expenditures of defendant village; (5) states that said petition is prematurely filed in that the petition for leave to appeal to the Supreme court of the State of Illinois for a review of the judgment of relator was not denied until the October, 1937, term of said court, "and under the said Act to provide for the incorporation of cities and villages as amended, and the first tax levy ordinance defendant could adopt subsequent to October, 1937, is the tax levy ordinance for the year 1938,

bonds at their maturity, and that relator may have such further order in the prunises as justice may require.

at benistnes anoticaells out attache (1) insheelet to rewone out personal to 6, include, or relator equition; (2) at L edgrapers muoris and lo measer yet intended of agrayment is bentained anotherella tagit seineb enelliy tusbesteb at emit tusserq out is anitaine escapta lo strengbut and way of noitaling any appropriation to pay the judgments of relator; (3) admits the allegations contained in paragraph 8 moifarildo Larenen att emaat of berirodtus at th fedt seineb inabneteb but bise att noteler yeg of installing thouse as asid orom at about -nos ent become anoitagilde bna atdeb thearn ati tada actata tatae stitutional limits as to debts; (4) states that pursuant to an Act to provide for the incorporation of cities and villages, approved April 10, 1872, as amended, defendant may levy, for general corporate purposes, taxes not to exceed the rate of 2/3 of 1% upon the aggregate valuation of all property within defendant village as the same was edd fadf graey jaerrue edd rol genef yfnuos bae edd berilleure assessed valuation of all proporty in defendent village for the year 1937 is the sum of \$590.889; that 2/3 of 1% of said assessed valuation the cum of 1,939.26, and satter sum is the total amount defendant may lovy for general corporate purposes; that the necessary, reasonable and economical engenditures of teleganders Islage said sum of \$3.99.26; that the revenues obtained by defendant from sources other than the said ten levy, together with the taxes obtainable from said ten levy, have been and will be insufficient to pay the necessity, reasonable and most economical corporate expenditures of beli'i ylandana al nolitied bisa that astata (5) spelliv intholob in that the petition for leave to appeal to the Supreme court of the ten sew rotsler to inoughet and to weiver a rot stanilli to etails edt rebnu bne" trues blas to mret 1937, term of the until as agailiv bon seitle to noits request of tot ebiver of tot biss -sadue jqobe bluco inchesieb conenthro year tetti the the bedeen unit to detober, 1937, is the tax levy ordinance for the year 1938,

and pursuant to said act said 1938 tax levy ordinance may be adopted at any time on or before the third Fuesday in September, 1938;" and defendant prays that said petition for mandamus may be dismissed at relator's costs.

Defendant contends: "I. It is mandatory upon the court to grant an application for a change of venue when the petition complies with the statutory requirements. II. Inasmuch as the question of whether bonds shall be issued by a municipality to fund its judgment debts is a matter within the discretion of the officials of the municipality, the courts cannot by mandamus compel the issuance of such bonds. III. A municipality cannot, for the purpose of funding judgments against it, issue bonds in the amount of such judgments where the aggregate of the bonds to be issued and the other indebtedness of the municipality (exclusive of said judgments) exceed five per cent of the assessed valuation of all the taxable property in the municipality, and where such judgments are based on involuntary liabilities."

Upon the oral argument counsel for defendant stated that it abandoned point III because of the decision in <u>Numburst Bank v. Village</u> of <u>Bellwood</u>, 372 Ill. 204. There the Supreme court held that an ordinance for the issuing of bonds to pay a judgment based on a tort claim, or an amount agreed upon in settlement of such judgment, is not invalid as increasing the municipality's aggregate indebtedness beyond the constitutional limit, as the bond issue merely evidences an already existing debt, nor is the ordinance invalid because the provision for a tax levy to pay the bonds makes the aggregate of taxes exceed the statutory limitation based on the property valuation. In that decision the court also calls attention to the fact that the statute (Ill. Rev. Stat. 1937, chap. 24, art. 5, par. 65.5, as amended in 1936) permits the funding of judgment debts by bond issues.

As to point I: The motion of plaintiff (relator) to strike certain paragraphs of the answer and for judgment was filed June 22, 1938. Defendant concedes that on the morning of June 23, 1938, it received notice of the motion, that it was set for hearing before

and jursuant to said he; said 1938 tax levy ordinance may be adopted at any time on or before the third Tweedey in September, 1933;" and defendent prays that said petition for mendemus may be dismissed at

Defendant contends: "I. It is mandatory upon the court to grant an application for a change of venue when the petition complies with the statutory requirements. II. Inagench as the question of whether bonds shall be issued by a municipality to furnits judgment debts is a matter within the discretion of the officials of the municipality, the courts cannot by mandamus compal the issuance of such bonds. III. A municipality cannot, for the purpose of funding judgments entire aggregate of the bonds in the amount of such judgments where the aggregate of the bonds to be issued and the other indebtedness of the municipality (exclusive of said judgments) exceed five per cent of the assessed valuation of all the targble property in the samicipality, and where such judgments are based on involuntary liabilities."

As to point I: The motion of plaintiff (relator) to strike certain paragraphs of the answer and for judgment was filled June 22, 11 in the contract of fur 23, 1957, 10 received notice of the motion, that it was set for hearing before

Judge Harry M. Fisher on June 24, 1938, at 10 a.m., and that the said motion was number seventeen on the said judge's metion call. No written notice that defendant would apply for a change of venue from Judge Fisher was served upon relator or its counsel nor was the relator orally notified that the application would be made. When the motion was called by Judge Fisher defendant presented to the court the petition for a change of venue. Counsel for relator them stated to the court that he had not seen the petition and had had no notice of any kind that it would be presented, and that he therefore objected to the granting of the petition. The court then denied the petition for a change of venue. The centention of defendant that it was mandatory upon the court to grant its application for a change of venue because the petition complied with the statutory regularements is without merit. See the recent case of People v. Mayering, 352 Ill. 436, where the court held that the statute requires notice to the opposite party of the proposed filing of a petition for a change of venue, and where no such notice is given the petition is properly overruled even though it alleges prejudice of the judge and that such prejudice was first known the day before the filing of the petition. The court further held that the fact that the assistant State's attorney appears and resists the petition is not a waiver of the requirement of notice. In the instant case the affidavit in support of the petition was subscribed and sworn to on June 23, 1938. The trial court was justified in assuming from certain parts of defendant's answer that it was seeking delay. Upon the oral argument in the instant case counsel for defendant admitted that the writ of mandamus would lie in the instant cause if defendant delayed the payment of the relator's judgment an "unre sonable time." Counsel further conceded that the trial court in passing upon relator's motion was required to pass solely upon a question of law, and that if its decision was correct defendant was not injured by the refusal of the trial court to grant the change of venue.

We are satisfied that there is no merit in point II. In <u>People</u> ex rel. Bunge v. Downers Grove San. Dist., 281 Ill. App. 426, the court

Judge Warry W. Station on June 34, 1930; at 30 man, and inch. the nake astion was number seventeen on the said judge's methon call. No mort super to supply a for alogs blow insheals is it solion neither Judge Fight was served upon relator or its counsel nor was the relator smally well limb that the applicable swald be made. More On sailon was called by Judge Fisher defendant presented to the court the petition for a change of venue. Councel for relator than stated to the court that he had not seen the petition end had had no notice of eny kind that tt would be presented, and that he therefore objected to the granting at the public of the same that the palling of the a shape of venue. The contention of defendant that it was mendatory upon the court noifited edit assess of venue of venue because the action of complied with the statutory requirements is without merit. See the recent case of People v. Myering, 552 III. 436, where the court held dant the statute requires notice to the opposite party low proposed filing of a patition for a change of venue, and where no such notice is given the petition is properly overraised even though it alleges prejudic said aroled yeb odd amond forth sew acibulars nows fadd has apply said to filting of the petition. The court further held that the fact that the assistant Ducte's attorney appears and resists the petition is not a waiver of the requirement of motice. In the instant case the affidavit in support of the petition was subscribed and sworn to on June 23, 1930. -busles to strag misters are grammag and bullity was trues as tries aff and's enewer that it was seeking delay. Upon the orel argument in the instant case coursel for defendant admitted that the warl for mandanus out to incarrag out beyold inchestab it ecurs instant out oil blow relator's judgment an "arressonable time." Coursel farther conceded of beringer was motion o'votaler nego grises of trivos Isini ont tath pers solely upon a question of law, and that if its decision was correct all fourth of Prior Libra and to Isaather will of hereigni ion on included the change of venue.

We are satisfied that there is no marit in point II. In Paople on rai, Sunge v. Comman. Orov. - 0. Ular., 201 111. app. (25, the nount

said (pp. 429, 430): "The claim has been reduced to a final judgment, and nothing remains to be done except to pay same. Under the circumstances as they exist in this case, it is the duty of the board of trustees of appellant district to take all steps necessary to make payment of the judgment. People v. City of Chicago. 360 Ill. 25; City of Cairo v. Campbell, 116 Ill. 305, 308, 309; City of Cairo v. Everett, 107 Ill. 75, 78; City of Chicago v. Sansum, 87 Ill. 182; People v. City of Cairo, 50 Ill. 154. An evasion of a duty by a public officer or a legal tribunal, amounting to a virtual refusal to perform the duty, warrants a writ of mandamus, and an inferior tribunal which has sought to evade the performance of a positive official duty while convened, cannot, by adjourning its meeting sine die, place itself beyond the power of the court to compel by mandamus the performance of the duty enjoined by law which such tribunal has undertaken to defeat by such evasion. Loewenthal v. People. 192 Ill. 222, 231, 232; Board of Supervisors v. People, 226 Ill. 576. Persons charged with the performance of public duties can have no higher duty than the payment of an honest debt reduced to judgment, and it is not discretionary with any such official whether or not he shall so do. People v. Rice. 356 III. 373, 377." (See, also, People v. Kelly, 361 III. 54, 59; People v. Village of Bradley, 367 Ill. 301, 307.) In the instant case counsel for defendant stated to the trial court that the village did not want to issue funding bonds to pay relator's judgment alone, but that it was willing to issue funding bonds to pay plaintiff and all other debtors of the village provided relator would reduce its judgment so that a legal bond issue could be made which would pay all of the debts of the village, and that the present debts of the village were in excess of the constitutional limit as to debts. In response to a question by the trial court counsel for defendant stated that none of the other claims against the village had been reduced to judgment, but that the village wanted them paid. As we have already seen, the argument made that the present debts of the village are in excess of the constitutional limit as to debts, was fully enswered by our supreme

said (pp. 429, 430): "The claim has been reduced to a final judgment, and nothing remains to be done except to pay same. Under the circumstances as they exist in this case, it is the duty of the board of -yes elem of theresees egets ile eart of jointable inclingue to content In value of the hadrened beauty of the an older at the line and the lines Calco v. Camballi, 116 Ill. 105, 104, 109; Chir of Calco v. Synwits. 107 111, 75, 78; tier of Gaiser v. Land, 87 111, Wat Loude v. City of Caire, 50 III. 154. An evasion of a duty by a public officer of a legal tribunal, assumiting to a virtual refusal to perform the and delive Length of the last as date, and and store a stranger which has sought to evade the performance of a positive official dety while convened, cunnet, by adjourning its meeting gine dia, place itself beyond and to some refer to company demandance the performance of duty enjoined by law winich such tribunal has underteinen to defect by men wration, top-mattel v. People, 19 Ill. 222, 2:1, 2:2; Board of Supervisors v. People, 226 Ill. 576. Persons charged with the thouse of public duties can have no higher duty than the permaner yranoliguesib ion si fi bas ,inemphy ot because fdeb jacon as lo any such official whether or not he shall so do. Jeong v. Hees 196 111, 371, 397.0 (dee, slee, People v. Halley 361 111, 54, 57; People v. Village of Bradley, 367 Ill. 301, 307.) In the instant case bib egalliv end fant trues laint ent of betata taches of feamos out to issue funding bonds to gay relator's judgment alone, but Ils bas Tlintale yee of aband gaiban't onest of gaillim asm it tent themable at a suber bluow rotaler belivery egalliv and to crotded rento so that a legal bond issue could be made which mould pay all of the abouts of the village, and that the present debis of the village were in excess of the constitutional limit as to debts. In response in to enen jail betate tendence to leanuos truco lairt edt to noiteeup the other claims against the village had been reduced to judgment, but that the village wanted them paid. As we have already seen, the arguould to execute all era egallive out to etdeb these or soft tadt each them constitutional limit as to debts, was fully answered by our Supreme

court in Elmhurst Bank v. Village of Bellwood, supra (p. 206), where the court stated: "The great majority of courts hold that the issuance of bonds by a municipality for the purpose of funding its valid indebtedness does not increase its aggregate indebtedness within the meaning of constitutional provisions similar to ours. (97 A.L.R. 442n.) In Mocsis v. Chicago Park District, 362 Ill. 24, 35, we followed that view and said: 'The issuance of refunding and funding bonds does not create additional indebtedness but merely evidences existing debts. (County of Jasper v. Ballou, 103 U.S. 745; Powell v. City of Madison. 107 Ind. 106; Hotchkiss v. Marion, 12 Mont. 218; Hamilton County v. Montpelier Savings Bank and Trust Co., 157 Fed. 19.) The Circuit Court of appeals for the seventh circuit, in the case last cited, in referring to the constitutional provision in question, said: "The constitutional limitation relates solely to the creation of indebtedness thereafter. and neither authorizes repudiation, nor affects the making of terms for payment of existing legal liabilities. The funding of such liabilities. therefore, authorized by statute and vote, was unaffected by the limitation, and the fact alone that the issue of funding bonds thereupon exceeded that limit neither implies nor amounts to violation of the constitutional provision." It necessarily follows that no additional indeptedness will be created by the refunding of the bonds and the funding of the floating indebtedness of the superseded park districts. "" In the instant case, defendant's verified answer stated that all revenues from the tax levy for general corporate purposes and from other sources have been and will be insufficient to pay the necessary, reasonable and most economical corporate expenditures, and the trial court, in passing upon plaintiff's (relator's) motion, had to assume that this statement was true, and he was justified, therefore, in commanding the village to issue the bonds in question and to deliver them to plaintiff (relator) and to levy taxes for the payment of the bonds. The judgment order recites that relator is willing to receive the bonds as payment for its judgment. Both in the trial court and in this court the attitude

court in discount to the discount of description of description of description consussi eds tent alou at ruce lo rethrolen teers edle that the court states of bonds by a municipality for the purpose of funding its valid inerly minister ecomboside and ecomposition and seed acombosided meaning of constitutional provisions similar to curs. (97 1.1.1. 442n.) In Manual w. Contagno Park Structure, for Dil. of the contagno Charles view and seid: 'The issuance of refunding and funding bonds does not ereate additional indebtedness but sevely evidences axisting debts. County of James v. Ballon, 103 U.S. 743; Promit v. 114 of Mariana. 107 Ind. 100; Weight as v. Verter, 12 cost. (18; dentison compary v. supportunity and (.) in Tel . . . says and an apply an interior of Appeals for the seventh circuit, in the case last cited, in referring Lanoisutitance entr : the enciteen of noisiver lanoisutitance ent es limitation relates solely to the creation of indebtedness thereafter, and neither authorizes repudiation, nor affects the maintain to an and a second payment of endsting legal liabilities. The funding of such liabilities, therefore, suthorized by statute and vote, was uneffected by the limitation, and the fact alone that the issue of funding bonds thereupen ent to mettalety of simpos con sellqui rentien fimil tent bebeense constitutional provision." It messassily follows that provisional indebtedness will be created by the refunding of the bonds and the funding of the floating indebtedness of the supersaded park districts. ** sumever lis fait betete resens beliktev a'tmahneleb ,ease jastent oit al from the tax levy for general corporate purposes and from other sources have been and will be insufficient to pay the necessary, reasonable and most economical corporate expenditures, and the trial court, in passing themstate aid that causes of ban inction (alreader) allithing mount was true, and he was justified, therefore, in commanding the was Thistiels of ment workled of due noticeup at abmoded to the the payer in the ferment of the beneat of the bonds. The judgment . Incurred as abrod out overser of gaillie at relater faut action rebro of the future of, work to the court could not the court the of the defendant was to secure what it called "reasonable time" in which to pay the judgment. It has had reasonable time to pay it.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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of the defendant was to secure what it called "reasonable time" in which to pay the judgment. It has had reasonable time to pay it.

The follows of the theath ease of feet wordy it stilled.

JUDGMENT AFFIRMUD.

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FRIEDA ROSINSKI, Appellee,

V.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation, Appellant.

APPEAL FROM LANICIPAL COURT OF CHICAGO.

305 I.A. 626

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action under the double indemnity provision of a life insurance policy issued by defendant on the life of Herman Piper. Defendant paid the face amount of the policy to plaintiff but denied that it was liable under the double liability provision of the policy. A jury returned a verdict finding the issues against defendant and assessing plaintiff's damages at the sum of \$483.35. Defendant appeals.

The double liability provision of the policy provided that if the insured sustained "bodily injuries, solely through external, violent and accidental means, resulting, directly and independently of all other causes, in the death of the Insured * * * the Company will pay in addition to any other sums due under this Folicy and subject to the provisions of this Policy an Accidental Death Benefit equal to the face amount of insurance then payable at death."

Plaintiff's theory was that the death of the insured was caused solely by external, violent and accidental means. Defendant's theory was that the insured's death was not caused solely through external, violent and accidental means, directly or independently of all other causes, but that disease and infirmities of the insured contributed to his death.

The insured, Herman Piper, died on March 18, 1937, at the County hospital. He was in a state of coma when he was brought into the hospital.

Defendant contends: "The burden was on the plaintiff to prove that death was the result, directly and independently of all other causes, of bodily injury sustained solely through external,

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305 I.A. 626

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1 Jury returned a vertical classical the insure applicat delendant and exact ing plaintist's damages at the sum of \$483.37. Defendant appears

The double liability provision of the policy provided that if the inmured satisfaced "bodily injuries, solely through external, viclent and estimated means, resulting, directly and independently of all other saures, in the death of the Insured * * * the Company will pay in addition to any other same due under this rolley and subject to the previous of this Folley an Acaidental Death Death Death Control equal to the facamount of insurance them payable at death."

Plaintiff's theory was that the death of the insured was caused solely by external, vision; and scuidental means. Defendant's theory was that the insured death of caused solely insured external, vision, and scalestal means, directly or incorpandantly of all other causes, but that disease and indirections of the insured contributed to his death.

The insured, Herman Piper, died on March 13, 1937, at the County hospital. He was in a state of count than he was brought into the hospital.

Defendant contends: "The burden was on the plaintiff to may that death was the result, directly and independently of all other sauses, of bodily injury outsined salely through external,

violent and accidental means. The plaintiff failed to meet this burden which is a condition precedent to recovery. II. Disease and infirmities of the insured contributed to his death, thereby barring recovery by plaintiff under the terms of the policy." Jpon the oral argument counsel for defendant stated that point I was intended as a contention that plaintiff had failed to make out a prima facie case that the insured came to his death from bodily injuries sustained solely through violent and accidental means. The brother of the insured testified that on an average of once a week during the last year of the insured's life he saw the insured, and that during that year the witness "saw no signs of ill health:" that the last time the witness saw the insured was on March 16 and that at that time his condition was the same. Dr. Kearns, the physician, surgeon and pathologist for the coroner of Cook county, testified for plaintiff. Defendant admitted the doctor's qualifications. The doctor testified that in March, 1937, he performed a post mortem on the body of the insured; that "the external examination revealed a well developed white male, 41 years of age, I feet 9 inches tall, and weighing 175 pounds:" that when he reflected the scalp to examine the contents of the head, he "found no fracture of the skull, but found an extensive hemorrhage between the outer covering of the brain and the brain, a subdural hemorrhage, on both sides behind this part of the head (indicating) and on the right side over this part of the head (indicating); in other words, over the parieto occipital area on both sides and the temporal area on the right side. In addition to this, there were punctate hemorrhages in the brain in the middle convolution of the parietal lobe on the right side; and in the part of the brain through which the tracts, the nerve tracts pass, the superior cerebral peduncles on both sides, there were also hemorrhages." The doctor further testified that from the conditions he found in the brain he was of the opinion, based on reasonable medical certainty, "that the changes in the brain were the result of injury, external violence;" that, in his opinion, "these injuries of the brain were the cause of death." The witness was not

nebrud aldi decidental means. The plaintiff falls of action to meet the burden which is a condition precedent to recovery. II. Disease and infirmities of the insured contributed to his death, thereby barring recovery by plaintiff under the terms of the policy. " Upon the eral argument nalingings a sambeboogs! was I fulled faul better inabustob for Leanusco that plaintiff had failed to make out a prime facte case that the incomed came he his death from builly injuries enclaimed solely through Jani belliter terms and another of the learner interest to the ofif a betract edt to reet the that the transfer of the transfer the ne he saw the insured, and that during that year the witness "saw no signs deren to and that at the bis oonil ties the same, it, Learne, the physicians, surgeon and polimicated for the corener of Gook county, Southful for glainfair. Defundent admitted the doctor's gualifications, The Account Condition black in March, 1837, so performed a work mortes on flow a believer notificational external examination revealed to whose the developed with make T years of each 5 feet 8 though a fall, and metalogical To class of the class of the end before the sale and a subsection to the head, he "found no fracture of the skull, but found an extensive mear hage between the outer covering of the brain and the brain, a subdural hemorrhage, on both sides behind this were of the need (indicating) Tenito al ((unitedital) been ent to trag chat revo este ingir ent no bas words, over the parieto occipital area on both sides and the temporal area on the right side. In addition to this, there were punctate . adol fafelraq all to moltulovanon albana and al atord air ai sequerrossi on the right side; and in the part of the brain through which the tracts, the perve treats mane, the emberior overweal poundled on both sides, these need also locared may gee, " The doctor Carthur testific that from the conditions he found in the brain he was of the opinion, based on removable medical estainty, "that the charges in the bruin ear the remil of injury external violence;" Dad, in his upinion, "these ira to send to all '. it all 'o all off erew mierd odd lo selvill

cross-examined. We hold that plaintiff made out a prime facie case that the insured came to his death from bodily injuries sustained solely through external, violent and accidental means, and that the instant contention of defendant is without merit.

As to the second contention: Plaintiff having made out a prima facie case that the insured came to his death from bodily injuries sustained solely through external, violent and accidental means, the burden was then upon defendant to show that disease and infirmities contributed to his death. (See Malty v. Federal Casualty Co., 245 Ill. App. 180, 185; Rogers v. Prudential Ins. Co., 270 Ill. App. 515. 525.) Defendant seeks to sustain its second contention by the testimony of Dr. Samuel L. Schreiber, who, at the time the insured was in the County hospital, was a junior resident interne. He was not a licensed physician at the time, in fact, was not licensed until about a year after the death of the insured. He testified that after the insured was brought to the hospital he made a complete examination of the insured; that "there was a - on his head there was a bruise over the right frontal bone;" that "my impression in the case was alcoholic coma with alcoholic gastritis, subarachnoid hemorrhage, tentative etiology, either some form of injury, hypertension or aneurysm of the head, a tentative diagnosis of ruptured aneurysm in the head * * * or in the spinal column; passive congestion of the kidneys, and hemorrhoids:" that he "drew a Wasserman * * * and sent it to the laboratory, and it was returned positive for syghilis * * * that syphilis will cause such a venous thrombosis of the head, with a period of unconsciousness, period of coma, such as this man was in." The following then occurred: "Q. And this venous thrombosis you found. was that sufficient to kill a man? A. I don't know what the Coroner found at the postmortem; but syphilis will cause venous thrombosis. I am assuming pathological entities will occur with syphilis." The witness further testified that the conditions he found could very well contribute to the insured's death. Upon cross-examination the witness was asked the following question: "Q. Assuming you had done a

eross-examined. We hold that plaintiff made out a prima facie case that the insured came to his death from bodily injuries sustained solely through external, violent and accidental means, and that the instant contention of defendant is without merit.

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skilful job, and there was blood in this fluid, you couldn't tell from the nature of your test whether that blood came from the laceration of the brain or whether it came from the venous thrombosis. as you say? A. No, that is true." The witness further testified that he did not examine the brain; that the brain was sent to the corner for post mortem; that "the correctness [of the physical findings | * * * is determined by the postmortem findings." We have carifully read the entire evidence of Dr. Schreiber and we are satisfiel that the jury and the trial court were justified in finding that it dd not prove that "disease and infirmities" contributed to the deah of the insured. Indeed, as the witness was not a licensed phylician at the time that he saw the insured in the County hospital. it's somewhat surprising that plaintiff's counsel did not object to the pinion evidence of the doctor. It is to be noted that the doctr admitted that the correctness of his opinion would be determind by the post mortem findings.

Under the record in this case the question whether the insued died as the result of bodily injuries sustained solely through violent and accidental means was a question of fact for the ury, and we are entirely satisfied with their finding.

The judgment of the Municipal court of Chicago is affined.

JUDGMENT AFFIRMED.

Sullyan, P. J., and Friend, J., concur.

fliff dob, and there was blood in this fluid, you couldn't olf worl eme boold that rection that the from from the la gration of the brain or whether it came from the venous thrombosis, as you say? A. No, that is true." The witness further testified end of Jaco sew miard and fand anhard out antenne you bib of t coller for fort morten; that "the correctness for the physical fill of a we the determined by the postmortem findings, " is have catice entire entire evidence of Dr. Schweiber and we are satic-"Id that the jury and the trial court were justified in finding that adt or betuding "actiunifal has esseib" tadt every ton bil ti dean of the insured. Indeed, as the witness was not a licensed physician at the time that he saw the insured in the County hospital, et Josido ton bib formuce a'llitatulg tadt antaingrat tadwence a ti the point on evidence of the doctor. It is to be noted that the doctr admitted that the correctness of his orinten would be detersind by the nortem findings.

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